

No. 12668

United States
Court of Appeals
for the Ninth Circuit.

EDWARD HERZINGER,

Appellant,

vs.

STANDARD OIL COMPANY OF CALIFORNIA,
a Corporation, and E. J. ODERMATT,

Appellees.

Transcript of Record
In Two Volumes
Volume II
(Pages 315 to 542)

FILED

JAN - 3 1951

PAUL P. O'BRIEN,
CLERK

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for the District of Nevada.

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February 10, 1950, 1:30 P.M.

Presence of the jury stipulated.

MR. HERZINGER

resumes the witness stand on further

Direct Examination

By Mr. Daly:

Q. I believe, Mr. Herzinger, I had just handed you what has been marked Plaintiff's Exhibit 16 for identification and asked you what it is.

A. That is a copy of invoice from the Davidson Wholesale, January 1, 1947 and May 3, 1947.

Q. And what is Plaintiff's Exhibit marked No. 17?

A. That is copy of an invoice from the Reeves Wholesale Company during the same period, January 1, 1947, to May 3, 1947.

Q. Mr. Herzinger, do you have any other records available which will show to any extent the business which you did during the period from January 1, 1947, until the date of the fire? A. No.

Mr. Daly: We will offer these plaintiff's Exhibits, 12 through 17.

Mr. Halley: On behalf of the defendant Odermatt, we have no objection to the introduction of the exhibits.

Mr. Platt: We have no objection either.

The Court: Exhibits 12, 13, 14, 15, 16 and 17 admitted in evidence.

Q. Mr. Herzinger, did you buy other items of merchandise in [301] the period January 1, 1947,

(Testimony of Edward Herzinger.)

until the date of the fire, other than shown on these exhibits, being Plaintiff's Exhibits 12 through 17?

A. No.

Q. Mr. Herzinger, did you make a profit in the operation of Mineral Hot Springs during the month of January, 1947? A. Yes.

Q. And did you make a profit in the operation of Mineral Hot Springs in February of 1947?

A. Yes.

Q. Did you make a profit in the operation of Mineral Hot Springs in the month of March, 1947?

A. Yes.

Q. Did you make a profit in the operation of Mineral Hot Springs in April of 1947?

A. Yes.

Q. Mr. Herzinger, based upon your general knowledge, being from operating this business and other like businesses, and what you know of this business and the profits made in the first four months, did you suffer a loss of profits from the fire there?

Mr. Halley: That is to be answered yes or no, your Honor.

A. Yes.

Q. And from the period of the fire until the time you moved [302] into the new buildings, how much loss of profit did you suffer?

Mr. Halley: To that we object, your Honor, first on the ground the proper foundation has not been laid; second, calls for conclusion of this witness.

(Testimony of Edward Herzinger.)

The Court: It seems to me that would be a matter for the jury to determine from the facts.

Mr. Wilson: It goes to the weight rather than the admissibility.

The Court: The jury, it seems to me, would be required to determine the amount of damages here and this is one of the items damage is based on. You can show any facts from which the jury might infer what the answer to the question is. I will sustain the objection.

Mr. Daly: In view of the Court's ruling, I will not attempt to proceed further along this line.

Q. Mr. Herzinger, when you visited the Mineral Hot Springs after the fire, did you observe the hose, or remains of a hose, near the pumps?

A. Yes.

Q. Can you tell us what you saw?

A. I saw what seemed to be the remains of a hose used for bringing gasoline from the gas truck into the storage tanks on the ground.

Q. Where was it located? [303]

A. Right alongside the gas pumps.

Q. Could you show us on this sketch over here where it was? A. Yes.

Q. Would you do that?

A. From the filler pipe between the gas pumps in a rather southerly, partly westerly, direction.

Q. Where was the nozzle of the hose, if you noticed?

A. It was still stuck down in the filler pipe.

Q. Mr. Herzinger, did you take any pictures of

(Testimony of Edward Herzinger.)

the premises there after the fire? A. Yes.

Q. When did you take them, if you remember?

A. The next day after the fire.

Q. Do you know what time of day?

A. Oh, approximately ten or eleven o'clock in the forenoon.

Q. I ask you, Mr. Herzinger to take and examine Plaintiff's Exhibits marked 18 through 25 for identification and tell us if those are pictures you took?

A. Those are the pictures I took on that date.

Q. Do those pictures accurately show what is in each one as to the condition of the premises there at Mineral Hot Springs? A. Yes, they do.

Mr. Daly: I offer Plaintiff's Exhibits 18 through 25 in evidence.

Mr. Platt: Your Honor, it is somewhat difficult to [304] know what each of these pictures represents, but in order to get a little further enlightenment upon them, I would like to have the privilege of asking the witness a question or two with respect to one of these photographs.

The Court: You may do so.

Mr. Platt: That is Plaintiff's Exhibit 19 for identification.

Q. (By Mr. Platt): I hand you, Mr. Herzinger, Plaintiff's Exhibit 19 for identification. I notice what appears to be a hose in that picture. Is that true? Is a hose indicated on that picture?

A. Not the hose. It is the wire coil from the remains of the hose.

Q. That is, when you talked about the hose in

(Testimony of Edward Herzinger.)

your direct examination, what you meant was the wire coil remaining that was in the hose before the fire? A. You mean when I said——

Q. Maybe I can clarify that a little more. That picture in part represents, doesn't it, the remains of the hose that you saw the next day after the fire?

A. Yes.

Q. Now just where was the hose located relative to the pumps? Were there any pumps remaining when you were there?

A. There were the burned carcass, you might say. The pumps were here, but they were burned.

Q. The remains of that hose which you saw, were they in the basement or were they on the surface in front of where the pumps should have been or were?

Mr. Parry: We object to that as not proper inquiry as to this exhibit. The testimony as to the hose being near the pump was the day of the fire. This picture was taken the next day.

Mr. Platt: I understand that. I think counsel misunderstands me. I acknowledge this photograph was taken the day after the fire, wasn't it?

A. Yes.

Q. That is what I am referring to and I am referring to the remainder of the hose in this photograph.

Mr. Parry: But your question was asked about being near the pumps the day of the fire.

Mr. Platt: What I hope to show, and make clear to the witness was whether the remains of this hose were lying near the remains of the pumps.

(Testimony of Edward Herzinger.)

Mr. Parry: What was the date?

Mr. Platt: On the 4th day of May, the day after the fire. In other words, your Honor, I am trying to locate the remains of that hose.

A. When I made the photograph, it wasn't laying near the pumps.

Q. Where was the remains of the hose actually lying as evidenced in that picture? [306]

A. In the basement, underneath what used to be the bar room.

Q. Then in order that there won't be any doubt at all in your mind and my mind, this photograph of the remains of the hose was taken in the basement?

A. Yes.

The Court: What is the number of that exhibit, Mr. Platt?

Mr. Platt: That is Plaintiff's Exhibit 19 for identification.

The Court: Any objection to the introduction of the photographs?

Mr. Halley: We have none.

Mr. Platt: I have none, your Honor.

The Court: The exhibits may be admitted in evidence. Nos. 18 to 25 inclusive.

Q. Handing you Plaintiff's Exhibit 18, Mr. Herzinger, can you tell us what that is a picture of?

A. That is a picture of part of the ruins of the Mineral Hot Springs taken after the fire.

Q. What ruins, if you know?

A. That is the wall made of sandstone or lime-

(Testimony of Edward Herzinger.)

stone that used to be the east wall of the grocery store.

Q. And the lean-to would have been toward you as you took the picture, is that right?

A. Yes. [307]

Q. Tell us the same thing about Plaintiff's Exhibit No. 19.

A. That is another picture of part of the ruins at Mineral Hot Springs. It shows the south wall of the same grocery store, what used to be. This portion used to be the bar room. And also shows the remains what used to be delivery gasoline hose.

Q. Go ahead again and tell us again on that, tell us where you were standing when you took that picture.

A. I was standing where used to be in front of the bar room. The front of the basement. I was facing in an easterly direction.

Q. Will you tell us the same thing about Plaintiff's Exhibit No. 20.

A. This is another picture of some of the ruins at Mineral Hot Springs and it shows the burned gasoline pump and part of the foundation the pump set on.

Q. Where were you standing when you took that picture?

A. I was standing in front of the cabin taking the picture in a southerly direction.

Q. Tell us the same thing about Plaintiff's Exhibit No. 21. What it is and where you were.

A. That is the same, some of the ruins down at

(Testimony of Edward Herzinger.)

Mineral Hot Springs and it shows the ruins in the basement. This was taken from east towards the west; in other words, toward the highway.

Q. Will you tell us what was in Plaintiff's Exhibit No. 22?

A. This is a similar picture, showing the remains in the basement, [308] just a slightly different angle, slightly to the northwest; still towards the highway.

Q. Will you tell us what is in Plaintiff's Exhibit 23 and where you were when you took the picture?

A. I was standing between the basement and the highway, the basement in a northeast direction. That is a picture of the south wall of what used to be the grocery store and it shows the double cabin behind the remains, which did not burn down, and shows part of the basement where the remains are.

Q. I notice a little dark place above a window, which would be the south window of what you call the cabin in the rear. What was that?

A. That was part of the window being charred from the fire.

Q. That was the only damage done?

A. The only damage done, just a little charred.

Q. Will you tell us what is shown in Plaintiff's Exhibit 24 and where you were standing when you took the picture?

A. Another picture shows gasoline pumps, part of one and also of another one, one of the posts held up the canopy, a little portion of the concrete on which the pump is located, also the filled pump to

(Testimony of Edward Herzinger.)

the underground tank. It was taken in a northeast direction.

Q. What is that article that looks a little like a mushroom in the center?

A. That was a stand where they used to put the hose when they [309] servicing a car, just sort of a bench outside.

Q. Tell us what is shown in Plaintiff's Exhibit 25 and where you took the picture.

A. It is another picture of one of the gas pumps and it is taken toward the highway in a westerly direction. It shows one of the gas pumps and part of the concrete island on which it is located.

Q. Mr. Herzinger, there has been considerable talk about burned checks. Are you, in your complaint, asking anything for the burned checks?

A. No.

Mr. Daly: You may cross-examine.

Cross-Examination

By Mr. Puccinelli:

Q. Mr. Herzinger, you purchased the Mineral Hot Springs in February of 1946, is that correct?

A. Yes.

Q. And from whom did you purchase it?

A. Rube Brown.

Q. And at the time you took possession of these premises, I will ask you to state if Mr. Moseley was already there? A. Yes, he was.

Q. And he then continued in your employment, is that correct? A. I didn't get you.

(Testimony of Edward Herzinger.)

Q. In other words, he just kept working there for you? [310] A. Yes.

Q. And as a matter of fact he is working for you at the present time? A. Yes.

Q. Generally, what is the capacity of Mr. Moseley; that is, what is his job?

A. Well, he is the manager there.

Q. And during your absence does he take the sole charge of the operation and the management of the Hot Springs and the store and the cabins and everything? A. He does.

Q. Now you stated on direct examination, you identify this diagram as constituting the premises which were in existence just prior to the fire on May 3, 1947, is that correct? A. Yes.

Q. Now, Mr. Herzinger, were all of these buildings destroyed? A. Yes.

Q. That is the bar, grocery, 12 by 12 cabin, 14 by 14 oil house. Was the pump house destroyed?

A. Yes.

Q. Mr. Herzinger, how far is it from the cabin to the pump house?

A. Oh, I would say approximately 80 feet.

Q. Eighty feet? A. Approximately. [311]

Q. How much distance was there from the oil house to the pump house?

A. Approximately forty feet, I would say.

Q. So that the pump house, then, Mr. Herzinger, was 40 feet away from the oil house and 80 feet away from the cabin?

A. That is my best knowledge.

(Testimony of Edward Herzinger.)

Q. Now I believe that you testified that the first notice that you had of this fire was about two o'clock on the afternoon of May 3rd, at which time you were in Wells, is that correct? A. Yes.

Q. Now how long after was it, after you discovered, or rather were notified as to the fire, how long after that was it that you arrived at Mineral Hot Springs? A. Approximately two hours.

Q. That would have made it about four, is that correct?

A. You mean four o'clock in the afternoon?

Q. Yes.

A. That is about the time, to the best of my recollection.

Q. How far is it from Wells to the Mineral Hot Springs? A. About 52 miles.

Q. What kind of road is that?

A. I couldn't just say at that time. It is an oiled road but there has been lots of construction work and they had gravel on part of it. [312]

Q. It is, however, a State highway, isn't it, Highway 93? A. Yes.

Q. You, upon arriving at Mineral Hot Springs, parked your automobile and talked to several people? A. Yes.

Q. Just whom did you talk to?

A. Talked to Mr. Odermatt, talked to Ross Moseley, talked to Mr. McLean, and there were a number of people from the San Juacinto, which I didn't know their names. They were strangers to me.

Q. But it is a fact, is it not, Mr. Herzinger, that

(Testimony of Edward Herzinger.)

after you discovered, or were notified, of the fire and you travelled to the Mineral Hot Springs, that Mr. Odermatt was there already?

A. I couldn't say as to that. He may have been.

Q. Did you see Lee Nielson?

A. I can't just recall whether I seen him there.

Q. Now please describe, if you will, Mr. Herzinger, just what the people who were at the scene of the fire were doing when you arrived there about four o'clock.

A. As near as I can remember they were just kind of grouped together and talking about the fire. All I could see they could do.

Q. Was the fire still burning?

A. Not in a blaze.

Q. Smoldering? A. Yes. [313]

Q. Did you see Jim Zilliox?

A. I couldn't recall if I did or not.

Q. What was Mr. Moseley doing?

A. Just talking to some of them people there, the same as anybody else.

Q. At the time you arrived there at four o'clock, or shortly thereafter, I will ask you to state if Mr. Moseley had opened up a temporary bar?

A. I hadn't seen him.

Q. Isn't it a fact, Mr. Herzinger, shortly after the fire that day Mr. Moseley opened up a temporary bar and sold liquor and drinks in this temporary bar in one of the buildings which was immediately behind the burned premises?

A. Not when I was on the premises.

(Testimony of Edward Herzinger.)

Q. How long did you remain on the premises after arriving there at four o'clock?

A. I stayed there until it was dark. I couldn't say just what time of the evening it was.

Q. It was dark however? A. Yes, it was.

Q. And during the month of May, in the area of Contact, Nevada and the Mineral Hot Springs, when did it start to get dark?

A. I would say about eight o'clock, possibly 8:30.

Q. So that you were there from four o'clock in the afternoon until at least 8:30 that evening? [314]

A. About that time.

Q. Or approximately four and a half hours?

A. Yes.

Q. And your testimony is to the effect that during the 4½ hours that you were there you did not see or know of the existence of a temporary bar which had been put up to the rear of the burned buildings and put in operation? A. No.

Q. You say you saw Mr. Odermatt that day?

A. Yes.

Q. On more than one occasion?

A. I couldn't just recall now whether one time or more.

Q. You stated, I believe, that you had a conversation with him? A. Yes.

Q. That conversation related to the filler tanks, did it not? A. Yes.

Q. He asked your permission to seal those filler tanks with wire, did he not?

A. No, he didn't.

(Testimony of Edward Herzinger.)

Q. He did not? A. No.

Q. When you bought the premises from Mr. Brown, would you tell us in addition to the real property what furniture and fixtures you bought with it?

A. You mean enumerate them as they were in the buildings? [315]

Q. Yes.

A. That candy case and cigar case was there.

Q. That was already in the place when you bought it in 1946? A. Yes.

Q. How long before that, do you know?

A. No, I wouldn't know.

Q. Maybe I can help you this way—how about the back bar and the mirrors?

A. That was there.

Q. How about the front bar?

A. That was there.

Q. And the 25 case cooler?

A. That wasn't there.

Q. When did you buy that?

A. Possibly the first part of July, '46, my best recollection.

Q. New? A. No.

Q. Used? A. Used.

Q. The three-compartment stainless steel sink?

A. That wasn't there.

Q. Was that purchased by you? A. Yes.

Q. When?

A. I would say the first part of '47, possibly January of '47. [316]

(Testimony of Edward Herzinger.)

Q. Was that used or new?

A. That was new.

Q. The electric refrigerator?

A. I bought that.

Q. When? A. About July, 1946.

Q. New? A. Used.

Q. The coca-cola cooler?

A. That was there.

Q. You don't know how old that was?

A. No.

Q. The 20-foot lunch counter?

A. I brought that down there.

Q. From where?

A. I would say about September, '46.

Q. Used? A. Yes.

Q. The butane gas stove?

A. I brought that down there.

Q. From where? A. Twin Falls.

Q. Used? A. New.

Q. When did you bring it there? [317]

A. I would say about January, '47.

Q. The 3-compartment sink used in connection with the lunch counter? A. I bought that.

Q. From where? A. Salt Lake.

Q. Used? A. New.

Q. When did you bring that there?

A. About January, '47.

Q. The two tables?

A. I brought them down.

Q. From where? A. From Buhl.

Q. Were they new or used? A. Used.

(Testimony of Edward Herzinger.)

Q. The cash register used in connection with the operation of the lunch counter?

A. I brought them down.

Q. Used or new? A. They was used.

Q. Used? A. Yes.

Q. And the cash register that you used in connection with the bar? [318]

A. That was there.

Q. That was already there? A. Yes.

Q. The 15 paintings? A. I didn't get that.

Q. The 15 paintings?

A. The pictures, I brought them down there.

Q. How long had you owned them prior to that time? A. Possibly a year.

Q. The deer heads?

A. They were down there.

Q. Already there? A. Yes.

Q. The bar stools?

A. I bought them in Salt Lake.

Q. When? A. Some time in January, '47.

Q. New or used? A. New.

Q. And the four bar stools as you identified as having no padding? A. I brought them down.

Q. From where? A. From Buhl.

Q. Were they new or used? [319] A. Used.

Q. And this panorama machine?

A. I brought that down.

Q. From where? A. From Buhl.

Q. New or used? A. Used.

Q. Who did you buy that machine from?

(Testimony of Edward Herzinger.)

A. From the Stewart Novelty Company, Salt Lake City.

Q. When?

A. Possibly—I would say the latter part of '44 or first part of '45.

Q. Was it new when you bought it?

A. Yes.

Q. And it had been in operation as of the date of the fire approximately three years? A. No.

Q. When did you buy it, in '44 or '45?

A. I had it in storage in Buhl there. It was operated on and off, part time.

Q. Well, when did you buy it?

A. I said as near as my recollection is '44 or spring of '45.

Q. So at least it was used for the full year of 1945 and the full year of 1946? A. Yes. [320]

Q. And up to the 3rd of May of 1947?

A. Yes.

Q. And you had owned it for at least two and a half years? A. That is right.

Q. You say it was in and out of operation?

A. Yes.

Q. The piano? A. That was there.

Q. This bench along the wall?

A. I brought that down from Buhl.

Q. Was that new or used at the time you brought it there? A. Used.

Q. And the 21 table? A. I brought that.

Q. New or used? A. Used.

(Short recess.)

3:15

Presence of the jury stipulated.

MR. HERZINGER

resumes the witness stand on further

Cross-Examination

By Mr. Puccinelli:

Q. Mr. Herzinger, had you owned any property in Nevada prior to the time you bought the Mineral Hot Springs? A. No.

Q. That was your first business venture in Nevada? [321] A. Yes.

Q. Where did you bring the 21 table from?

A. It came from Contact.

Q. Didn't you testify just prior to the recess that you brought that from Buhl, Idaho?

A. Not the 21 table.

Q. How about the poker table?

A. The poker table was there in the building.

Q. How about the crap table?

A. I brought that down from Buhl.

Q. Buhl, Idaho? A. Yes.

Q. The poker table you say was already on the premises? A. Yes.

Q. That was an old table? A. Yes, it was.

Q. And the crap table, was that old or new?

A. That was new.

Q. Where did you buy it?

A. I had it built in Buhl.

Q. In Idaho? A. Yes.

(Testimony of Edward Herzinger.)

Q. The dining table I believe you referred to?

A. That was on the premises.

Q. When you bought them from Mr. Brown?

A. Yes.

Q. And the six chairs?

A. Possibly about three of them were there and I brought about three, probably three older chairs. I know of bringing some but I can't say as to just how many.

Q. The chairs that you brought in, were they new or old? A. They were used chairs.

Q. Then there was a two-burner fuel stove?

A. I brought that down.

Q. Used? A. New.

Q. How much did you pay for that?

A. With the fixtures and connections approximately \$200.

Q. When?

A. I would say about August, '46, my best recollection.

Q. Then the light fixture which was over one of the gambling tables. Which table was that over?

A. Over the crap table.

Q. Was that used? A. New.

Q. And a Wurlitzer music machine?

A. I brought that down.

Q. What is that?

A. Well, some sort of juke box. It is a music machine like they have in all these amusement places. [323]

(Testimony of Edward Herzinger.)

Q. Was that on the premises the day of the fire? A. Yes.

Q. Where?

A. The back end of the building.

Q. Of which building? A. Of the bar.

Q. Was it in use? A. Yes.

Q. As I understand it then, in the bar you operated the juke box and a moving picture machine?

A. Yes.

Q. Were they two separate things or were they one? A. Yes, two separate ones.

Q. And that was used? A. Yes.

Q. The slot machines?

A. I brought them down.

Q. From Buhl? A. From Wells.

Q. Who did you buy them from in Wells?

A. Harry Simon.

Q. When?

A. The fall of '46, I would say, possibly August or September, my best recollection.

Q. Were they new or used? [324] A. New.

Q. The silverware and dishes?

A. I brought them down there.

Q. Were they used?

A. Part of them was used and part of them was new.

Q. You refer to a panorama kit, what is that, Mr. Herzinger?

A. That is repair kit with lots of, I would say, delicate parts of that panorama, the thing that you

(Testimony of Edward Herzinger.)

repair the panorama with and parts in addition for panoramic pictures.

Q. And by the panorama you mean the moving portion of that combined music and moving picture machine?
A. Yes.

Q. Now tapestry and Christmas decorations. Describe the tapestry for me.

A. Oh, just like any other tapestry. It was on the walls.

Q. What size was it?

A. Varied sizes, from 2 by 4 feet, maybe some 3 by 4 feet; had a picture of a big lion on there, and just ordinary tapestry like you have in places.

Q. Were they on the place when you bought it, or did you bring it with you?

A. I brought it with me.

Q. They were used when you brought them?

A. Not the Christmas decorations. The tapestry was used, but not the Christmas decorations.

Q. What did the Christmas decorations consist of?

A. They were these colored bulbs that you put on Christmas trees and all the decorations you hang on Christmas trees. [325]

Q. Tinsel and little ornaments?

A. Yes, and ornaments.

Q. And then there was a burglar alarm system?

A. I put that in.

Q. When?

A. In the fall of '47—'46, pardon me.

Q. Describe that for me.

(Testimony of Edward Herzinger.)

A. Well, it consists of some transformers and fixtures and bells, bell cord and buttons that you put in different places where you can touch them to signal different places in the cabins if there is any trouble; also to call if there is a telephone call for me, buzzer to my cabin and switches on it. If the door was ever opened, it would throw a switch on and give an alarm into the cabins.

Q. Was that electrically operated?

A. It was when it was operating.

Q. Can you, by coming to this blackboard, designate where these transformers were, the buzzers were, the buttons were and where the switches were?

A. I could quite close.

Q. Would you do it please?

A. We had a couple of transformers back on this lean-to and these wires led to this door of the lean-to and it led up here to these windows and doors in there, also it carried through the building and over into this cabin here, the 12 by 12 cabin, and it branched off into the bar room and was connected to this door.

Q. By that you are referring to the front door?

A. Front door of the bar room. Then there was some buttons coming underneath the bar, around underneath the lunch bar, and button underneath the bar in the grocery store, and wires came across here to the cabin where I was located, the bell and buzzer in that cabin.

Q. Would you take the chalk and mark the location of the transformers?

(Testimony of Edward Herzinger.)

A. On the back wall of the lean-to.

Q. Then, Mr. Herzinger, you made reference to some appliances, a portion of the burglar alarm system, in relation to the windows. What do you mean?

A. If the window would be opened, there was a switch—if the window should be opened it would connect under the switch, making contact, which would ring a bell.

Q. It would cause an electric current?

A. Well, there would be a current in there, you have contact down here and has a little direct current, just like a little door bell. You couldn't operate that on your 110 volt current.

Q. That was separate? A. Yes.

Q. And these switches that you say created a contact and start off an alarm, were generally situated near your windows [327] and your doors?

A. Yes.

Q. In case of opening? A. Yes.

Q. Then you refer to a set of fire extinguishers. Were they there when you came there?

A. Yes, they were there.

Q. What did this set consist of, how many extinguishers?

A. Just off-hand I can't tell you.

Q. Your best recollection, Mr. Herzinger?

A. As to how many?

Q. Yes. A. I would say 20 or possibly 25.

Q. Where were they located?

A. All through the bar room and grocery store.

(Testimony of Edward Herzinger.)

I think, but I wouldn't say for sure, in the cabin, but they were scattered all through there.

Q. How many fire extinguishers were in the bar room? A. I would say possibly twelve.

Q. Would you come down and designated their location? A. Yes.

Q. You might designate them using the letter "F."

A. That is about to the best of my recollection where they were.

Q. Now, Mr. Herzinger, to the best of your recollection how [328] many were in the grocery store?

A. I would say possibly six.

Q. Would you designate them by the use of the letter "F"?

(Witness complies.)

Q. Then you refer to those panorama films. Were they films that you could change in connection with the use of the movie machine? A. Yes.

Q. And did they come with the machine?

A. No, I have to buy them separate.

Q. You bought them later or about the same time?

A. I would buy them at various times.

Q. Then you had a two-wheel beer cart.

A. That was on the premises.

Q. That was on the premises when you took them over? A. Yes.

Q. How about the glasses that you used in connection with the operation of the bar?

(Testimony of Edward Herzinger.)

A. I brought most of them down there from Buhl.

Q. Wasn't there some glassware there when you took the place over?

A. There was some glassware there. I had to buy that from the party also.

Q. The adding machine, was that old or new?

A. It was seldom used. [329]

Q. Now the brooms, mops, etc., I imagine you just bought from time to time as you needed them, isn't that right?

A. Yes.

Q. Now the grocery counter?

A. It was there.

Q. That was on the premises when you bought them?

A. Yes.

Q. And the article that you describe as back counter?

A. That was there.

Q. Is that the shelving?

A. Yes, shelving and bottom drawers and all that.

Q. And the grocery scale?

A. I brought that.

Q. Was that used?

A. Yes.

Q. And the kerosene refrigerator?

A. That was on the premises.

Q. Tell me, Mr. Herzinger, how did that kerosene refrigerator work?

A. All I could tell you it had a small wick and it had a small tank where you poured some kerosene into that and this kerosene had to flow to this wick and then you would light the wick.

(Testimony of Edward Herzinger.)

Q. And then there would be an open draft?

A. Well, there was a drum. With the drum you couldn't see [330] the flame.

Q. You removed the drum or container to light the wick and then you put it back on, is that right?

A. Yes.

Q. The Diesel parts?

A. I bought them.

Q. From time to time as you needed them?

A. Yes.

Q. The cash register in the grocery store?

A. I bought that.

Q. Was that used? A. It was used.

Q. Then you refer to a large icebox. I imagine that is the one that was in the lean-to there?

A. Yes, that was there.

Q. Was that already there when you bought the place? A. Yes.

Q. Two cream cans?

A. They was on the premises too when I bought the place.

Q. Light bulbs I imagine you bought from time to time? A. Yes, I bought them.

Q. Then you had in the oil house you designated two barrel pumps? A. I bought them pumps.

Q. Who from? [331]

A. I don't know what the company is, but I bought them off Rube Brown.

Q. Did you buy them from Rube Brown or Ernie Odermatt, the defendant in this action?

A. I can't say for sure where they came from. It might be I bought them from Ernie Odermatt.

(Testimony of Edward Herzinger.)

Q. You listed them as \$40? A. Yes.

Q. I will ask you if it isn't a fact that you bought them from Ernie Odermatt and you paid \$5.80 for each one, or a total of \$11.00 at the time you bought them?

A. I have no recollection I paid anything like that.

Q. It might be? A. It is possible.

Q. The air compressor?

A. It was on the premises.

Q. The large vise?

A. I bought that large vise.

Q. Was that used or new?

A. It was slightly used.

Q. And the two hydraulic jacks?

A. I bought them.

Q. Were they used or new? A. New.

Q. And the vulcanizing set? [332]

A. I bought that.

Q. Used or new? A. New.

Q. The two gas lanterns?

A. I brought them down.

Q. And were they used or were they new?

A. They were new.

Q. Then you listed certain properties in the cabin. You referred to two bed springs, mattresses and bedding. Were they on the premises when you purchased the Mineral Hot Springs? A. No.

Q. And you brought them there? A. Yes.

Q. And were they used or new? A. New.

Q. When did you bring them there?

(Testimony of Edward Herzinger.)

A. The first part of January, 1947.

Q. About five months prior to the fire?

A. Four months.

Q. The two alarm clocks?

A. I brought them down.

Q. Used or new? A. New.

Q. And the fuel oil stove? [333]

A. I brought it down.

Q. Used or new? A. New.

Q. Now you refer to personal belongings valued at \$400. Whose personal belongings were they?

A. They really belonged to the employee that had that cabin.

Q. They were not yours?

A. They wasn't mine personally. They belonged to him.

Q. They were located in this 12 by 12 cabin?

A. Yes.

Q. So that \$400 item was a loss sustained by one of your employees, isn't that correct?

A. Well, at the time it was, yes.

Q. Now in the basement you said you had a half-horse compressor? A. Yes.

Q. And was that there when you came on the place? A. No.

Q. You brought that there? A. Yes.

Q. Was that used or was it new?

A. It was slightly used.

Q. Then you said you had a complete network of piping? A. Yes.

Q. By the way, do you mean the installation of

(Testimony of Edward Herzinger.)

pipes for the [334] purpose of furnishing water to the various buildings?

A. Yes, and the drains and the faucets and all pipes connected to them, the vent pipes.

Q. They were what you refer to as plumbing generally in the house, is that correct?

A. Yes.

Q. Was that in place?

A. No, I put that in.

Q. Did Mr. Brown have any?

A. Not to speak of. At the time I bought the place he had no drains whatever.

Q. And you installed that as an improvement to the premises? A. Yes.

Q. Then you had a hot water tank?

A. I brought that down.

Q. What kind of hot water tank?

A. A butane.

Q. Was that open flame?

A. Well, the flame was enclosed. You couldn't see the flame. There was a door you had to open.

Q. Where was that located, in the basement?

A. Oh, close to the south wall.

Q. And toward the west or how?

A. Oh, possibly 20 feet from the east wall and possibly six feet from the south wall. [335]

Q. And in the southeast corner of the building, is that correct? A. Of the basement.

Q. Of the basement, rather.

A. Yes, that is correct.

Q. Then there was a small table? A. Yes.

(Testimony of Edward Herzinger.)

Q. And was that there when you bought the place from Brown?

A. No, I brought that down.

Q. Was it a used table, Mr. Herzinger?

A. Yes.

Q. Then I believe you then began to describe articles which were in the pump house?

A. Yes.

Q. You said a small electric plant?

A. Yes.

Q. Was that new or used?

A. That was used.

Q. That is what Mr. Brown had, wasn't it?

A. Yes, it was.

Q. And a water pump?

A. Yes, that was on the premises when I bought the place.

Q. The garden hose?

A. I bought that. [336]

Q. So that other than the garden hose, everything which was contained in the pump house had actually been there at the time you purchased the premises? A. Yes, in the pump house.

Q. Now at the time you bought the place from Mr. Brown, did you take into consideration, in fixing your price, all of these articles which were there and which you have listed as having been there? Did you inventory the place and put a value on it before you made him an offer?

A. On these items we were describing?

Q. What I am driving at, when you bought the

(Testimony of Edward Herzinger.)

place did you fix in your own mind that these eight deer heads were worth \$400 and therefore fixed that price in your purchase price?

A. Well, in general we discussed it with Rube Brown. I discussed with him the value he put on the property.

Q. And that included eight deer heads valued at \$400?

A. Approximately valued at \$400.

Q. Do you have any idea how old those deer heads were? A. No, I don't.

Q. Well, you know they were in existence as early at least as 1946?

A. Yes, they were there before.

Q. Now you listed the value at \$10,900?

A. Approximately.

Q. How did you carry this on your books? [337]

A. I don't know how do you mean, on the books?

Q. Well, in determining the net value or net worth of your business, what value did you place on all of your property for the purpose of your own accounting?

A. I could keep track of what that amount would be in there.

Q. I will ask you to state what system of depreciation you had for taxation purposes?

A. That I couldn't tell you off-hand.

Q. Did you ever depreciate the property, or your accountant?

A. Possibly my accountant did. He done all that work for me.

(Testimony of Edward Herzinger.)

Q. And your accountant, I presume, helped prepare your accounts in such manner that he could take care of that depreciation, that is, for the purpose of taxation?

A. He must have. I didn't prepare them. He done all my book work.

Q. The information with which he did that, however, he received from you, isn't that correct?

A. Yes, he did.

Q. In your books did you carry an account referred to as "Furniture and Fixture" account?

A. Not to my knowledge, I didn't.

Q. Then, Mr. Herzinger, how did your accountant depreciate the furniture and fixtures from year to year for taxation purposes if you had no furniture and fixture account?

Mr. Parry: Objected to as assuming several things [338] not in evidence and argumentative. Improper cross-examination.

The Court: Objection sustained.

Q. Who makes out your income tax returns, Mr. Herzinger? A. Willard Bowen.

Q. Is he an accountant? A. Yes.

Q. What is his address?

A. Pocatello, Idaho.

Q. How long has he been keeping your accounts?

A. I would say approximately 15 years.

Q. Now over that 15-year period has he kept a complete set of books for you, including monthly receipts and disbursements?

A. As to my knowledge, I wouldn't know. He

(Testimony of Edward Herzinger.)

should have because he gets out the paper he sends me that I have to send to my collector of internal revenue.

Q. You may not have understood me, Mr. Herzinger. I mean in keeping your accounts for you, did you furnish him all the invoices, all the receipts from monies paid out?

A. You mean if I took the books or just the receipts up to him?

Q. Yes.

A. I would take the books up there.

Q. The books were kept by you?

A. Well, they were kept by my employees first and I would have to get information from the books from my employees. [339]

Q. In other words, your books were maintained by your employees. From them you would ascertain your income and disbursements and then that information you would in turn give to Mr. Bowen, from which he would prepare your returns?

A. Yes.

Q. Did he do any other work for you in the way of accounting, other than your income tax work?

A. No.

Q. So you probably went to see him about once a year, is that correct?

A. Yes.

Q. And the books kept in connection with the operation of the Mineral Hot Springs were kept where, Mr. Herzinger?

A. At Mineral Hot Springs.

Q. And by whom were they kept?

(Testimony of Edward Herzinger.)

A. Mr. Moseley.

Q. And do you know in what part of the premises he kept them?

A. He generally kept them right by the cash register, where I generally seen them, or possibly the drawer underneath the cash register, back of the bar.

Q. What ledgers did he keep?

A. Ledger book and pay-day book.

Q. Did you testify that you operated slot machines six or seven years prior to the fire?

A. Yes. [340]

Q. Where?

A. Some in Buhl, around Buhl.

Q. That is Idaho? A. Yes.

Q. Where else?

A. The Ice Cave Service Station.

Q. What town is that?

A. That is north of Shoshone on Highway 93 on the way to Sun Valley.

Q. This trailer house which is marked with the letter "T," was that there when you bought the premises? A. No.

Q. When did you get title to that, or when did you get possession of it? When did you buy it?

A. It must have been the latter part of December, '46.

Q. Was that new or used?

A. It was used.

Q. What kind of a trailer house was it?

(Testimony of Edward Herzinger.)

A. Well, it was no factory made trailer house, had no name, so I just couldn't tell you.

Q. Was it a home-made one?

A. Made, I presume, by some carpenter, cabinet maker.

Q. And constructed of wood? A. Yes.

Q. Four wheel or two wheel? [341]

A. Two wheel.

Q. By the way, did you help Mr. Moseley make this sketch? A. On the board there?

Q. Yes. A. I held the ruler for him.

Q. Did you tell him the general set-up? Did you help him in that?

A. Not in the general set-up I didn't.

Q. Mr. Herzinger, I am going to hand you a document which is on file in this case, which is called a bill of particulars, which purports to set out in detail those items which it is alleged you lost as a result of the fire. Now, did you assist in the preparation of that bill of particulars by furnishing to whoever prepared it here some invoices and receipts and bills which you identified today and have now been made part of the record?

A. Yes.

Q. So that this then should correspond or be accurate when compared with these other invoices that we talked about, these receipts, these bills?

A. Yes.

Q. These photographs, Mr. Herzinger—you may have so testified and I don't remember it—when did you say you took these?

(Testimony of Edward Herzinger.)

A. The next day after the fire.

Q. That would be May 4th? [342]

A. Yes.

Q. And at about what time?

A. Oh, it could have been ten o'clock, eleven o'clock, twelve, along in that time.

Q. Between ten and twelve that morning?

A. As near as I can recollect it.

Q. Now, Mr. Herzinger, do these pictures accurately represent the condition of the premises as you saw them the afternoon of the third, after you had been notified of the fire and went to your place?

A. There could have been some slight changes.

Q. I want you to examine—save and except, however, I understand the wire remains of that hose, which were in the basement, that was not there? A. That was not there.

Q. Other than that, would you examine these and tell me whether or not those pictures represent the scene as it was the afternoon of the 3rd when you went to your place at Mineral Hot Springs, after being notified of the fire?

A. Outside one or two minor things, I would say yes.

Q. Would you tell me and the jury in what respects were those minor changes or what differences?

A. For one thing, over here is a wire stretched across here between the ruins and the highway and some rags hung on the wire so that if somebody should drive in at night they wouldn't [343] drive over the ruins, which I put there.

(Testimony of Edward Herzinger.)

Q. So that on Plaintiff's Exhibit 25 the only change that you would make would be the wire extending across the driveway so as to prevent cars from accidents, is that correct?

A. That is correct.

Q. What changes would you make on Plaintiff's Exhibit 19? A. There would be this hose.

Q. So that, other than the presence of the hose, this would be the same as it was the night that you saw it, that is, the night of the 3rd at four o'clock?

A. I don't see any change.

Q. Showing you Plaintiff's Exhibit 23, would you recommend or make any changes as to that?

A. Just for the same purpose, that I put a stick down here and stretched this wire across here for the same purpose of keeping cars from driving down there at night.

Q. So other than the barricade, which was a wire and stick, the rest of that is the same as you saw it that afternoon of the third?

A. Yes, the ruins is.

Q. And Plaintiff's Exhibit 21?

A. I can't see any change in that outside of some people standing there. That has that same wire stretch out.

Q. So other than the people standing there, presumably wanting to get into the picture, that is substantially the same? [344]

A. Approximately.

Q. And Plaintiff's Exhibit No. 20?

(Testimony of Edward Herzinger.)

A. I would say it would be about the same, outside that post I probably had set in there.

Q. That is that area to keep cars from driving in?

A. Yes, and possibly that filler hose could have laid by this tank here the day before, which doesn't show in the particular picture at the present time.

Q. And No. 18?

A. I would say that is the same, outside a car or two.

Q. Other than the automobiles you see in this photograph, the rest is the same as you saw it that afternoon? A. Yes, I would say it is the same.

Q. For the sake of time, Exhibits 22 and 24?

A. I would say they are the same, excepting there had been a hose with a filler pipe and this receiving pipe.

Q. That is referring to Exhibit 24, but Exhibit 22 is the same, is that correct?

A. Just the same as I seen it there before.

Q. Did you see Mr. Odermatt on the 4th of May, 1947, that was the day following the fire?

A. I don't recollect seeing him on that day.

Q. Did you see a Mr. Werner on that day?

A. No, I don't recollect seeing Mr. Werner.

Q. Did you remain at Mineral Hot Springs all of the next day? [345]

A. I was there the biggest part of the time. Part of the time there and part of the time gone.

Q. Where to?

A. Oh, made one trip to the postoffice at Contact. Made a trip to Ray King's.

(Testimony of Edward Herzinger.)

Q. Oh, I am sorry—you did not leave——

A. You mean leave for good?

Q. Yes.

A. Not that I can recall, no.

Q. By the way, Mr. Herzinger, what kind of a camera did you use to take these photographs?

A. You mean the name of the camera?

Q. Yes.

A. That I couldn't tell you.

Q. What size?

A. I couldn't tell you as to size.

Q. Was it your camera?

A. No, it was not my camera.

Q. Whose camera was it?

A. I had two cameras, one belonged to Mrs. Black and the other belonged to Mrs. Lou Robbins.

Q. And Mrs. Black? A. Yes, sir.

Q. And who took the pictures?

A. I did. [346]

Q. Whose camera did you use?

A. I used both the cameras.

Q. Who developed them?

A. They were developed in Buhl and I just can't place that photographer's name.

Q. And that was on May 4th, the next day?

A. That I took the pictures, yes.

Q. I believe you stated that following the fire you didn't set up any type of business for about six or seven days?

A. To the best of my recollection that is about what it was.

(Testimony of Edward Herzinger.)

Q. And that when you did, it was in this cabin which was to the east of the burned portion of your property? A. Yes.

Q. And in that you set up a temporary bar and a grocery store, is that correct?

A. Very little groceries there because there wasn't any room for groceries. I just set up a little temporary.

Q. And slot machine?

A. I had two old used slot machines.

Q. Where were they?

A. Against the east wall in that building.

Q. What building?

A. That same building I opened up in the little cabin.

Q. Where had they been prior to the fire?

A. Over in Buhl, Idaho. [347]

Q. Now your testimony is that that bar was not in operation, this temporary bar, was not in operation the day of the fire? A. It wasn't.

Q. It was not? A. No.

Q. I will ask you to state if you recall having a conversation with Ernie Odermatt in that temporary bar the same afternoon of the fire?

A. No, I didn't.

Q. Would you say that you didn't?

A. I didn't.

Q. You did not? A. No.

Q. When you went on the premises the afternoon at four o'clock, I will ask you to state if you

(Testimony of Edward Herzinger.)

saw any evidence of drinking by any one who was there? A. I can't recall any one drinking.

Q. How long did you remain or do business in this temporary bar?

A. I would say possibly 60 days, to the best of my knowledge.

Q. That would have brought it to the latter part of July? A. Possibly in there.

Q. And then where did you move into?

Mr. Parry: If the Court please, it seems to me, in view of the Court's ruling on lost profits, this is immaterial. [348] Our position is this—true, we started into this on direct examination, endeavoring to lay a foundation for lost profits. We were unable to get the facts, as your Honor ruled, so we did not proceed on that. There is no evidence now of any claim of lost profits.

The Court: I can't see the materiality of operations there after the fire.

Mr. Puccinelli: If your Honor please, as I understand the pleadings of counsel, it is contended that as a result of the fire there was a period of time when he was forced to operate under restricted circumstances. I am prepared to show, by way of cross-examination, that there was a second fire at Mineral Hot Springs during the year 1947, which stopped him from doing business.

Mr. Parry: We say that is all immaterial because all lost profits issue was withdrawn from the jury. It doesn't make any difference if there were a dozen fires.

(Testimony of Edward Herzinger.)

The Court: Do I understand counsel has withdrawn the issue of lost profits?

Mr. Parry: Yes, your Honor.

The Court: Do I understand the question of lost profits is out of the case?

Mr. Parry: Yes, your Honor.

Q. Finally you moved into the new building Friday, December 26, 1947, is that correct? [349]

A. Yes, sir.

Q. You testified further, Mr. Herzinger, on direct examination, that your chief source of income was from the U. C. Land and Cattle Company?

A. Yes.

Q. In what way?

A. They employed a lot of employees because they ran a lot of cattle and put up lots of hay and they had ranches scattered all through the valley there and the payroll was exceptionally large all through that part of the country.

Q. Thus, as a matter of fact, while the U. C. Land and Cattle Company was in operation there, their payroll represented the largest source of income to that entire portion of the country?

A. It did.

Q. When did the U. C. Land and Cattle Company wind up its business and begin to lay off men?

A. To my best knowledge they started liquidating some time in 1947 and I think they were through the latter part of '47.

Q. Isn't it a fact, Mr. Herzinger, that the greater part of the winding of the business and closing of

(Testimony of Edward Herzinger.)

the ranching and the letting go of men and employees had been practically completed in the spring of 1947?

The Court: Pardon me, the question of profits is not to be considered. How is this material?

Mr. Puccinelli: He maintains by his direct [350] examination, as does counsel, that because he was there in business and became the U. C. Land and Cattle Company had this terrific payroll, he was denied the privilege, by virtue of the fire, of serving all these employees of the U. C. Land and Cattle Company.

The Court: Wouldn't that go back to the question of profit?

Mr. Puccinelli: That is correct.

The Court: And don't I understand that profits is out of the case?

Mr. Parry: That is correct.

Mr. Puccinelli: Maybe I didn't know how generous counsel was. Am I to understand that counsel has waived their claim of lost profits?

Mr. Parry: If the English language is clear, we have.

Mr. Puccinelli: Then I withdraw the question.

Q. I show you what has been marked as Plaintiff's Exhibit 20 for identification and I will ask you to state if that photograph shows the remains of the fabric of the hose?

A. Yes, I can see a few imprints of the fabric.

Q. Would you take this pen and outline, to the best of your ability, on that picture the fabric of

(Testimony of Edward Herzinger.)

the hose? (Witness complies) Would you mark the beginning of that line with an "X"? (Witness complies) Would you please identify this large dark object and this other one? [351]

A. This is the remains of a gas pump and this is the small island it sets on, concrete.

Q. You heard Mr. Moseley testify that the slot machines yielded about \$100 a day?

A. That is not my recollection.

Q. Was that reported to the Nevada Tax Commission?

Mr. Parry: I think that is improper cross-examination.

Q. How much did you make off the slot machines?

Mr. Parry: That is not proper cross-examination. Not gone into with this witness on direct. It is immaterial since profits were withdrawn.

The Court: I can't see where that is proper cross-examination. It wasn't brought out on direct.

Mr. Puccinelli: This simply goes for the purpose of a substantial claim made by the plaintiff as to monies contained in the slot machines and which he lost.

The Court: Very well, the ruling will be withdrawn and I will overrule the objection. You may inquire.

Q. To the best of your recollection, Mr. Herzinger, what did those slot machines yield daily?

A. What part of the year would you be referring to?

(Testimony of Edward Herzinger.)

Q. On an average, or if you want to restrict it to the date of the fire, in the months of April and May?

A. I would estimate that as about——[352]

The Court: (Interrupting) I ruled on that same question and the objection will be sustained.

Mr. Puccinelli: Do I understand now that the objection is sustained?

The Court: Yes, because the same question was brought up on direct examination and there was an objection to it. I have other reasons, the one that it is not proper cross-examination. I don't see how you can get an accurate estimate of how much fixed.

Mr. Puccinelli: That is the intent of the Act, that you are to make an accurate report of gambling returns and pay a two per cent tax on it.

The Court: Well, the objection will be sustained. If you have any reason to find out what he reported, I would not rule against that, but to have a man testify what a gambling game is going to earn in a specified time, I don't want that kind of testimony.

Mr. Halley: If we may explain our reason: It is my recollection Mr. Moseley stated the machines were taking in about \$100 a day at that time, which substantiated his statement that he had in the slot box approximately a thousand dollars and Mr. Herzinger had not been by for a period of about ten days and he accumulated this money, and we [353] wanted to show or inquire if the machines were

(Testimony of Edward Herzinger.)

making \$100 a day, if Mr. Herzinger had reported that to the Nevada Tax Commission.

The Court: You can inquire as to what these machines were making, but not what, from his experience, a certain set of slot machines ought to make at a certain time. Let us have the question.

Mr. Parry: As I understand the record was this, Mr. Herzinger stated he had not opened the slot machines for ten days and he had the only key, and then, as your Honor mentions, when we tried to inquire to show the money, objection by counsel was sustained. There is nothing in direct examination of this witness and we think it is improper cross-examination to ask this witness about what another witness said.

Mr. Halley: Mr. Moseley was asked, when examined along that line, whether or not any reports were made on the tax for it and he said Mr. Herzinger took care of those matters, so now we have Mr. Herzinger here and we are wondering if he did make the tax reports to the Tax Commission on these slot machines.

The Court: The reason for my ruling was I did not want evidence as to what a man, acquainted with a gambling machine, would know as to what it ought to earn in a certain period of time. I do not think we want evidence of that kind here.

Mr. Halley: We quite agree with you on that. [354]

The Court: Now what is your question?

Mr. Halley: We wanted to know if Mr. Her-

(Testimony of Edward Herzinger.)

zinger made a report to the Tax Commission on the take of the slot machines during the quarter in question here.

The Court: You can answer that question.

Mr. Wilson: Is that a material question as to the issues involved in this case?

The Court: There is some evidence in this case as to certain quantity of money being in these slot machines. Probably it is a preliminary question. It may be material.

Mr. Daly: Isn't there evidence in the record it took \$300 to load the machine and weren't we restricted in our attempts to show there was any more money in those machines than what it took to load them originally? It is my memory the Court ruled, when we intended to show any more money in those slot machines, against our contention there was any more.

The Court: I do not think I ruled with that thought in mind.

Mr. Halley: Maybe I have not made myself clear and maybe I am not correct on the evidence, but as I remember it, Mr. Moseley testified that he had approximately a thousand dollars in this so-called fishing tackle box, which he called the slot box, pertaining to the slot machines, and he also had testified that Mr. Herzinger had not been by for a ten-day [355] period and he kept this amount of money there, took care of the receipts of the slot machines, etc., and he was then asked if over a ten-day period had the slot machines made a thousand dollars over

(Testimony of Edward Herzinger.)

that particular period and he said they averaged about \$100 a day, if my recollection is correct. Then he was asked if reports had been made to the Nevada Tax Commission concerning the profits and operation of the slot machines and if my recollection does not fail me, he said Mr. Herzinger made those reports, and the only thing we want to know from Mr. Herzinger now is whether or not he made the reports that Mr. Moseley said he does make to the Nevada Tax Commission.

Mr. Daly: I think counsel's explanation shows that is not proper cross-examination of this witness.

The Court: Doesn't it tend to show how much money was in those slot machines at that time, or in that slot box, either one of those two places, either in the slot machines or in the slot box?

Mr. Daly: If the Court please, I believe Mr. Herzinger's testimony is that he was the only one that had the key to the slot machines and he had not been there to remove any money from the machines for ten days; and the Court will also remember he was not allowed to testify as to the contents of the slot box, as we call it, because he didn't know of his own knowledge what was in there. [356]

The Court: Will you just state your purpose for that question, Mr. Halley?

Mr. Halley: This, your Honor, Mr. Moseley, when he was on direct examination by counsel for the plaintiff, stated that there was under the counter the sum of \$800 and slot machine money approximately a thousand dollars. He stated that the take

(Testimony of Edward Herzinger.)

on the machines for ten days averaged \$100 a day and he was justifying the thousand dollars that was there showing a loss here, as I remember, this money they claim that was lost, whatever was taken in by the slot machines during that period, the period that Mr. Herzinger had not been there, the ten day period. That is in evidence and no objection was made and counsel for the plaintiff brought it out at that time. He was then asked, if the Court please, as I recall, if reports were made to the Nevada Tax Commission concerning the take on the slot machines. At that time he said Mr. Herzinger made the report.

The Court: The purpose of the inquiry whether the report was made is to find out whether there is a means of ascertaining how much money was in that slot box at that time in evidence?

Mr. Halley: The evidence is in there was a thousand dollars by Mr. Moseley and that these reports, Mr. Moseley didn't know anything about reports, he said his employer made the report, so we would like from Mr. Herzinger if he has made [357] those reports Mr. Moseley referred to.

The Court: Answer the question.

Mr. Daly: What is the question?

Q. (By Mr. Puccinelli): Did you make a report of the proceeds of any gambling to the Nevada Tax Commission for the first and second quarters of 1947?

Mr. Daly: We object to the question because it

(Testimony of Edward Herzinger.)

has absolutely no materiality to any issue in the case.

The Court: Ordinarily it wouldn't, but there is a claim here there was a thousand dollars in that slot machine box and there is testimony that Mr. Herzinger had not been there for ten days and when he was last there he took the money from that slot box. Now the slot machine box is evidently supplied from the slot machines.

Mr. Wilson: I don't believe that was the testimony. I believe it was a box used for coin to supply coins working into and out of the machines and I believe that was the testimony that he had given.

The Court: There was a thousand dollar bank roll.

Mr. Wilson: Yes, and they drew that down and kept that bank roll in there.

The Court: Well, I will allow the question.

Mr. Wilson: May I make one other observation on this?

The Court: Yes. [358]

Mr. Wilson: As I see it, any statement which is required to be made wouldn't evidence what was there that day, because I presume those returns have accumulated over a period of weeks or months, so just how we can connect up this particular filing or lack of filing with that day's proceeds or that day's accumulated supply of money, I don't see.

The Court: I don't know what we will find out

(Testimony of Edward Herzinger.)

as a result of the answer to the question, but I am going to allow the question to be answered. You may answer the question.

Mr. Daly: Do you know what the question is?

(Question read.)

The Court: Answer that yes or no.

A. No.

The Court: We will be in recess until Monday morning at 10:00 o'clock.

Court recessed at 4:30 p.m.

Monday—February 13, 1950 10:00 a.m.

Presence of the jury stipulated.

All attorneys present.

MR. HERZINGER

resumed the witness stand on further

Cross-Examination

By Mr. Puccinelli:

Q. Mr. Herzinger, in the statement of your own insurance, did you make out a proof of loss and submit it to your insurance [359] company?

A. I did.

Q. Do you have a copy of that proof of loss?

A. I don't have it with me.

Q. You say you don't have it with you?

A. I don't know what you mean, copy of proof of loss. Do you mean a report of the fire?

Q. Well, at the time you were dealing with the

(Testimony of Edward Herzinger.)

insurance agent you went over what had been lost and the respective values of the items, isn't that correct? A. Not to my knowledge.

Q. Did you make a settlement with the insurance company? A. Yes, I did.

Q. And what did you use as a basis of the settlement?

A. The only thing I know of is the insurance papers.

Q. Including the insurance papers, didn't you make out a listing of the buildings you had lost, what value they had, so that insurance company could be advised as to what you had lost?

A. Well, on the insurance papers the buildings were listed on there and so much insurance on the buildings.

Q. Now isn't it a fact that at the time you made the settlement with the insurance people that you depreciated the building 50 per cent on the basis of 15 years? A. No. [360]

Q. Did you sign that proof of loss?

A. You mean with the insurance company?

Q. Yes.

A. Not to my knowledge, I never signed no proof of loss with the insurance company.

Q. Mr. Herzinger, do you know how old those buildings were?

A. No, I wouldn't have any idea.

Q. You don't know how long prior to the time you took the place over the buildings had been constructed on that place?

(Testimony of Edward Herzinger.)

A. I had some idea how long they had been at that place. Whether they were new buildings at the time though, I don't know.

Q. What is your knowledge or information how long they had been at that particular place?

A. Possibly eight years prior to my purchase.

Q. Eight years prior to 1946 or 1945, was it that you bought there? A. '46.

Q. So eight years prior to 1946. They were frame buildings, were they not? A. Yes.

Q. Mr. Herzinger, you know Mr. Whitney, don't you, the insurance man that talked to you at your place of business?

A. I possibly met him about twice.

Q. Isn't it a fact that in your negotiations with Mr. Whitney [361] you reached an agreed figure as to the value of the buildings which you lost and that that agreement was reached between you and Mr. Whitney in Wells following the fire?

A. I don't think we agreed on any value of the buildings.

Q. Did you sign any document at all or any paper at all for Mr. Whitney in connection with your settlement with the insurance company of what you had lost?

A. I have no knowledge of it.

Q. I will ask you to state, Mr. Herzinger, if it isn't a fact that in settling with Mr. Whitney on the buildings, No. 1, which was the bar you designated a value of \$3600 value; No. 2, grocery store,

(Testimony of Edward Herzinger.)

you put a value of \$1984; building No. 3, \$517.50, and building No. 4, \$1104?

A. Did I place a value on them?

Q. Yes, and agreed with him that that was a fair settlement figure?

A. I have no knowledge of any agreement.

Q. When you purchased the place originally in 1946 from Mr. Brown, what values did you place upon these various buildings, furniture and fixtures, so as to determine the purchase price that you paid to Mr. Brown?

A. As I recall, we didn't set any values on any certain parts.

Q. Just what did you take into consideration, Mr. Herzinger, in determining for yourself what you were willing to pay for the business? [362]

A. Oh, judging by the amount of business he had there.

Q. And what else?

A. Well, the property on the place. That is about all you ever go by when you buy a place of business. A person has a place for sale and you want so many dollars for it, you walk in there and look at his business and you decide whether it is worth that or not.

Q. So that in negotiating with Mr. Brown, you took into consideration his volume of business as one factor, and then you took into consideration as another factor the value of the property, is that correct? A. Yes.

(Testimony of Edward Herzinger.)

Q. What value did you then place on the buildings?

A. Didn't place any value on the buildings, that is, not any figures.

Q. Didn't you determine for yourself, in negotiating for the purchase of this property, what the bar was worth or the grocery store was worth or the first cabin was worth and the oil house, in dollars and cents?

A. No, I didn't.

Q. So then we can conclude from that that in determining how much money you would pay Mr. Brown, you gave no thought whatever to what the improvements were worth. That wasn't important to you at that time?

A. Well, it was important, but I didn't give it a thought except [363] for the part of the deal.

Mr. Puccinelli: I have no further questions.

Cross-Examination

By Mr. Platt:

Q. Mr. Herzinger, do you know whether any of the gasoline in the tanks took fire? By that I mean the gasoline that was actually in the tanks in front of your place or near your place?

Mr. Parry: If I might interpose an objection—Mr. Herzinger wasn't there and it wasn't gone into on direct examination.

Mr. Platt: He may have some knowledge.

The Court: What is the question?

(Question read.)

(Testimony of Edward Herzinger.)

The Court: Objection overruled. Answer the question.

A. I would have no knowledge of that, for the simple reason I was not there. When I did get to the place, there was no more blaze around there, just smoldering.

Q. Did you make an investigation after you arrived at the scene of the fire to learn what happened to any gasoline that was in the tanks, if any?

A. I did not.

Q. Do you know whether any adjustment was made with you with respect to the value of such gasoline that had been delivered to you? [364]

A. No, I don't.

Q. Did you make any effort, or do you know of any effort having been made, for reimbursement to you for gasoline that was later extracted from the tanks?

A. I have no knowledge of anything personally.

Q. Could you tell us whether your buildings were covered with a tar paper roof or what?

A. A composition roof.

Q. Composition? A. Yes.

Q. And as an elemental part of the composition, was tar or some inflammable substance like tar a part of it? A. I just couldn't say as to that.

Q. I understand you to state that you had a supply of oil. By that I mean oil used for heating purposes. Is that true? A. Yes.

Q. And where was that situated?

(Testimony of Edward Herzinger.)

A. In the front part of the bar room, on the outside.

Q. What was that oil used for?

A. It was used for heating the bar room.

Q. How was the heat supplied?

A. Through fuel oil stove.

Q. What kind of a stove was that, if you remember?

A. A two-burner fuel oil stove. I just couldn't say what make. [365]

Q. Well, was there a pilot light kept burning in order to help create the heat or help start the fire under the oil?

A. No, it had no pilot light.

Q. How did you start the stove?

A. By turning the oil on and opening the door in the bottom and reaching with a match.

Q. It started with a match? A. Yes.

Q. Was that used for heating water.

A. No.

Q. What was it used for?

A. Just to heat the bar in cold weather.

Q. I understand that you served lunches at your place?

A. Occasionally they would fix them, a hamburger maybe, hot dog and cup of coffee.

Q. How did you keep the hot dogs hot?

A. Never kept them hot, only when they demanded them.

Q. Did you serve hot coffee or hot soup or hot dogs? A. Coffee.

(Testimony of Edward Herzinger.)

Q. How did you heat the coffee?

A. Heated on the butane stove.

Q. And where was the butane stove situated?

A. Close to the rear end of the building, behind the lunch counter.

Q. In what room? [366]

A. In the bar room.

Q. Can you point out about where in the bar room it was situated?

A. About that place there against the wall.

Q. Now just a minute, Mr. Herzinger. This mark here, "X," which on the blackboard would be the eastern end of the bar room, does that mark "X" indicate a door?

A. I don't remember now just what that "X" was put on there for.

Q. Can you point out on the blackboard where any doors or windows were in the bar room?

A. There was two windows on the west side, those on each side of the door, then two windows on the east side, placed almost the same place, a short distance on either side of the bar room.

Q. Did you have a butane tank flowing butane to the butane stove about which you have testified?

A. I don't know if you call it a tank or ball. It was a ball that held butane.

Q. How was that butane ignited?

A. On the stove.

Q. Well, how did you light the stove?

A. Well, the butane stove had a small pilot

(Testimony of Edward Herzinger.)

light. Sometimes it was lit and sometimes it would go out.

Q. Well, do you know, of your own knowledge, Mr. Herzinger, [367] that a pilot light, in order to burn, or any light in order to burn, has to have air?

A. I would think it does.

Q. And can you describe to the Court and jury about where that pilot light was situated relative to the stove?

A. There was a grill right through the center of the stove, possibly 18 inches wide and two feet long. This pilot light was directly under that grill, possibly one inch below the grill, could have been an inch and a half.

Q. Can you tell us how many motors you had in and about your building at or about the time of the fire? By motors, I mean electric motors.

A. Taking each building separate?

Q. Pardon?

A. You mean as a whole or each building separate?

Q. Yes, as a whole, and then if you will, tell the Court and jury where they were located.

A. There was one small motor for the refrigerator in the bar room.

Q. What refrigerator do you mean?

A. The electric refrigerator, approximately 25 feet.

Q. And in what room was that?

A. In the bar room.

Q. And where was there another one?

(Testimony of Edward Herzinger.)

A. One was in the music machine, one was in the picture machine. [368]

Q. Were there any more?

A. Not in the bar room.

Q. Were there any other motors in any other building outside of the bar room?

A. There was one motor in the basement.

Q. To what was that motor connected?

A. To that large beer box that was underneath the beer bar.

Q. Do you recall any other motor in or about the building?

A. In the pump house, about six feet below the surface of the ground, by the water pump.

Q. Any other one?

A. I can't recall any more motors in the buildings.

Q. Mr. Herzinger, I want to call your attention to dealer agreement which was offered in evidence here by your counsel. I think it is Plaintiff's Exhibit 10. This agreement, you will recall, was entered into on the 3rd day of June, 1941, by and between the Standard Oil Company of California, a corporation, and O. J. McVey, and then, as I understand your testimony, this dealer's agreement was later assigned to you through, I think, the Browns, is that correct?

A. Yes, I bought it from the Browns.

Q. So at the time of the fire you were operating under this agreement of June 3, 1941, is that true?

(Testimony of Edward Herzinger.)

A. As near as I know. I didn't sign any other agreement.

Q. You don't know of any other agreement? [369]

A. No, I don't.

Q. I want to call your attention, Mr. Herzinger to one or two paragraphs in this agreement, and I am reading from a copy and if the clerk will kindly hand me the original, which I hand you, and I wish you would refer to paragraph 9, which I desire to read to the Court and jury:

“9. Dealer agrees to protect, defend, and hold harmless the Company against all claims for damage to property, or injury or death to persons, directly or indirectly resulting from any acts or omissions of Dealer or Dealer's employees in or about the said premises, either in the maintenance or operation of the tanks, containers, pipes, pumps and other facilities thereon, or in the vending therefrom of the products and goods handled by Dealer hereunder”

In that paragraph where the “Company” is used, you understand it to mean the Standard Oil Company of California.

Mr. Wilson: Your Honor, I am going to object to this line of questioning on the ground the agreement speaks for itself and that is a question of law to be decided by the Court; calling for conclusions here of the witness based on a legal question.

The Court: I think the objection is good. [370]

Mr. Platt: Your Honor please, what I am at-

(Testimony of Edward Herzinger.)

tempting to show, if I may, notwithstanding this agreement, the defendant, Standard Oil Company of California, has been made a party defendant.

The Court: That is apparent without any testimony from this witness. Objection will be sustained.

Q. I want to call your attention, Mr. Herzinger, to paragraph 11 of this agreement:

“11. Dealer agrees to conduct all operations hereunder in strict compliance with all the laws, ordinances and regulations of governmental authorities. Dealer further agrees to conduct said operations in a manner best suited for the preservation of Company’s property of whatever kind and nature, the furtherance of the sale of Company’s products and the promotion of public good will towards the Company. It is understood and agreed that Dealer in the performance of this agreement is engaged in an independent business and nothing herein contained shall be construed as reserving to Company right to control Dealer with respect to his physical conduct in the performance of this agreement. It is further understood and agreed that Company reserves no right to exercise any control over any of Dealer’s employees [371] and that all employees of the Dealer shall be entirely under the control and direction of Dealer who shall be responsible for their actions and omissions. Dealer undertakes and agrees that he will, at his own expense, during the term hereof, maintain full insurance under any

(Testimony of Edward Herzinger.)

Workmen's Compensation Laws effective in said state covering all persons employed by and working for him in connection with the performance of this agreement, and upon request shall furnish Company with satisfactory evidence of the maintenance of such insurance. Dealer accepts exclusive liability for all contributions and payroll taxes required under the Federal Social Security Act and State Unemployment Compensation Laws as to all persons employed by and working for him in connection with the performance of this agreement."

May I ask, Mr. Herzinger, first, if the Standard Oil Company of California ever controlled or attempted to control any of your employees?

Mr. Wilson: I am going to object to that, your Honor, on the ground that goes beyond the scope of the direct examination and even beyond the scope of this case. We have never, in any way, indicated an agency between Standard Oil and Mr. Herzinger and we are not even concerned with that as an element [372] of this case.

The Court: Objection will be sustained.

Q. Mr. Herzinger, you are presently under contractual relations, are you not, with the Standard Oil Company of California?

Mr. Wilson: I presume that is objectionable, I presume it is immaterial.

Mr. Platt: I desire to make the offer, your Honor.

(Jury excused.)

(Argument in absence of the jury.)

(Testimony of Edward Herzinger.)

The Court: The offer will be denied.

Presence of the jury stipulated.

Cross-examination by Mr. Platt resumed.

Q. Mr. Herzinger, do you happen to know what brand of kerosene refrigerator that was that you had in your place? A. No, I don't.

Q. Do you know whether it was what they call a Servel refrigerator?

A. I couldn't say. It could have been.

Q. You do not remember?

A. I do not remember.

Mr. Platt: I think that is all, your Honor.

The Court: Any further examination?

Re-Direct Examination

By Mr. Daly:

Q. You mentioned on cross-examination, I believe, Mr. Herzinger, that this picture machine was in storage in Buhl, Idaho for [373] a while?

A. It was in working order but it—

The Court: (Interrupting) Read the question.
(Question read.)

The Court: What has that to do with this case?

Mr. Daly: It goes to the item of damages, if the Court please.

Q. Mr. Herzinger, going back to the day of the fire, you stated, I believe, that you first heard something about the fire in Wells, is that correct?

A. Yes.

Q. Tell us, if you will just briefly, what you did

(Testimony of Edward Herzinger.)

after you heard some indications there had been a fire there?

A. I went to a telephone and tried to telephone the place to see if there was anything to it.

Q. You said that call didn't go through, I believe. How long were you making that telephone call, if you know?

A. Oh, possibly 15 or 20 minutes.

Q. And then what did you do?

A. Then I went and got in my car and started for the place.

Q. Did you drive straight to Mineral Hot Springs?

A. Yes, I drove straight to Mineral Hot Springs, outside of meeting that man. I had some car trouble on the road and I stopped and asked him if he knew anything about the fire up the line—he was coming from that direction—and he said he did. [374] That was the first I really knew the fire was there.

Q. How long did you spend with him, do you know? A. Just a matter of minutes.

Q. When you got to the Mineral Hot Springs, tell us what you did.

A. I stopped in front of the pumps, approximately 25 feet in front of where that concrete is, and I got out and walked up there to within six feet of the pumps, looking the ruins over.

Q. Did you see the remains of this hose at that time? A. Yes.

(Testimony of Edward Herzinger.)

The Court: Haven't we gone all over this ground?

Mr. Daly: It is preliminary, if the Court please.

The Court: Very well, then.

Q. Did you see the defendant Odermatt at that time? A. Yes, I did.

Q. And I believe you said you had some conversation with him. What was that conversation?

A. I asked Mr. Odermatt if he knew how the fire started and he told me it couldn't have been the gas truck because the delivery was already made. I asked him if the delivery was already made why that hose was still laying on the ground with the nozzle in the filler tank and he said it must have been negligence on Mr. Nielson's part not picking the hose up and putting it on the truck.

Q. Was there anything more said between you at that time? [375]

A. Oh, a few things, I can't just recall just exactly what it was. He wanted to haul up a couple of butane tanks that were off at the side and I stated I thought everything should be left just the way it was until the insurance adjuster comes to look the property over, and later on I noticed these cans were gone.

Q. Mr. Herzinger, you were examining these photographic exhibits which you took and you were asked to state in what respects, if any, the exhibits which were taken the next day were different from the situation on the day of the fire. I hand you Plaintiff's Exhibit No. 24 and ask you if you can

(Testimony of Edward Herzinger.)

tell us any other difference between the items shown in that exhibit between the exhibit and the situation as it was the day of the fire?

A. The only difference I can see here the cap is closed on the filler pipe, which it wasn't the day before when I saw it and there is a tag wired on to that cap.

Q. Is that item you refer to, the tag, the light colored article that appears to hang from a part of the cap on the filler in the center of the picture?

A. Yes.

Q. What was that tag made of, Mr. Herzinger?

A. It appeared to be a paper tag.

Q. Mr. Herzinger, those invoices which were introduced here, representing articles purchased by you from the period between [376] January 4, 1947, and the time of this fire, did they include any purchases from Standard Oil?

A. No, they didn't.

Q. Did you make purchases during that time from Standard Oil Company? A. Yes.

The Court: What exhibit number, if any, did that appear?

Mr. Daly: That was Plaintiff's Exhibit Nos. 12 through 17.

Q. Did you make any other incidental purchases during that same period, Mr. Herzinger?

A. Yes.

Q. Do you know the amount of those purchases?

A. No, not just off-hand.

Mr. Platt: Your Honor please, I assume that

(Testimony of Edward Herzinger.)

these purchases, about which the witness is being interrogated, were made under the dealer's contract in evidence here.

Mr. Daly: Is Mr. Platt referring to this last question? At least what I intended, when I asked the question, were not purchases from Standard Oil.

The Court: This last question does not have any reference to the Standard Oil, Mr. Daly says.

Mr. Platt: Well, I want to understand that, your Honor. [377]

The Court: Will you reframe the question so your purpose is clear?

Mr. Daly: Yes, I will.

Q. Did you make purchases, Mr. Herzinger, in connection with the Mineral Hot Springs, between the period from January 4, 1947, to the date of the fire, other than purchases in the invoices which we have and purchases from the Standard Oil?

A. Yes.

Q. What, generally, were those purchases, Mr. Herzinger?

A. Mostly retail store purchases and combined retail-wholesale store.

Q. For items for sale there? A. Yes.

Q. You were asked, Mr. Herzinger, about the value of the barrel pumps and the question was asked whether or not you had purchased those barrel pumps from Mr. Odermatt for some five dollars and something. When you were describing and placing a value on those barrel pumps, what items were you including in that value?

(Testimony of Edward Herzinger.)

A. I was including both the barrel and contents in the barrel too.

Q. In other words, how many barrel pumps did you have? A. Two pumps.

Q. And how many barrels?

A. Two barrels. [378]

Q. And were the pumps connected with the barrels? A. Yes.

Q. What was in the barrels?

A. Kerosene in one of the barrels and white gas in the other barrel.

Q. What was the purpose of having white gas and kerosene there?

A. For customers that came there from the valley.

Q. Mr. Herzinger, how often did you pay Standard Oil Company for petroleum products delivered there prior to the fire?

A. From the beginning, when I first started there, my best recollection he was paid every time he made the delivery.

Q. Who was paid? A. Odermatt.

Q. The money was paid directly to him for Standard Oil?

A. Yes, either to him or to his truck driver.

Mr. Platt: If your Honor please, I think that question and answer is somewhat confusing. I ask that the question be stricken while I interpose an objection.

The Court: It may be stricken.

Mr. Platt: Evidently there were two methods of

(Testimony of Edward Herzinger.)

delivery to Mr. Herzinger from this testimony. May I inquire?

Q. (By Mr. Platt): Who delivered all the Standard Oil products to you?

Mr. Parry: I think we should object to that as being improper at this time. That is cross-examination. [379]

Mr. Daly: If I may withdraw the question.

The Court: Very well. Do you want to reframe the question?

Mr. Daly: Yes.

Q. (By Mr. Daly): Mr. Herzinger, did you have any credit relationships with Standard Oil Company of California? A. Yes.

Q. What were they? What credit arrangements did you have?

A. I made arrangements whereby I would pay them only once a month and simplify my books in that way.

Mr. Daly: I think that is all. Thank you, Mr. Herzinger.

The Court: Any further cross-examination?

Re-Cross Examination

By Mr. Puccinelli:

Q. This credit relationship that you were talking about just a moment ago, you said you made that relationship so you would simplify your books, is that correct? A. Yes.

Q. Are those the books that you kept at the

(Testimony of Edward Herzinger.)

ranch? A. For the books kept in the place.

Q. Well, what books did you keep in the place?

A. A book we call a day book and book that we call a ledger.

Q. What manner of monthly payment would have simplified your method of keeping books? [380]

Mr. Parry: Objected to as argumentative.

The Court: Objection sustained.

Q. Describe for me the books that you actually kept.

Mr. Parry: We object to that as having been gone over at great length on direct examination.

The Court: Objection sustained.

Q. Just one additional question, Mr. Herzinger. Your testimony today is that when you placed a value of \$20 on the barrel pumps, what you actually meant is the barrel pumps and the contents of the barrels and the barrels? A. Yes.

Q. Is that right? A. That's right.

Q. The conversation that you had with Mr. Odermatt, where was that?

A. You mean the one at the ruins of the Springs?

Q. You testified that on the day of the fire, when you got to the Mineral Hot Springs, when you arrived there that you had a conversation with Mr. Odermatt? A. Yes.

Q. Now where was the place that you had the conversation?

A. Right in front of the gas pumps.

Q. Who, if any one else, was present?

A. Nobody that I can recall.

(Testimony of Edward Herzinger.)

Q. I show you one of the pleadings, Mr. Herzinger, which is a [381] part of this case, entitled a Bill of Particulars, and turning to page 2 of the Bill of Particulars, I show you an item entitled "2 Barrel pumps, \$45." Is that correct?

A. That is correct the way it is written down there.

Q. However, as written here it is inaccurate, is that correct?

A. It was on the barrels and contents, because they are not listed on there otherwise.

Q. So it should have been two barrel pumps, barrels and contents, \$45?

A. I would think that would be proper.

Q. Well, were you claiming \$45 for the two barrel pumps, or were you claiming \$45 for the barrel pumps, the barrels and the contents?

A. Just \$45 for the barrels and the pumps and oil.

Mr. Puccinelli: That's all.

Witness excused.

Mr. Wilson: At this time I would like to call Mr. Odermatt back to the stand for a few questions.

E. J. ODERMATT

having been previously sworn, testified as follows:

Direct Examination

By Mr. Wilson:

Q. Mr. Odermatt, you testified that you had from the Standard Oil Company a certain manual. You had one manual only at the time you were operating in 1947, is that correct? A. That's right. [382]

Q. I am going to hand you——

A. I wouldn't say that this is the exact manual. This may be a revised edition.

Q. Then I will hand you Plaintiff's Exhibit 26, marked for the purpose of identification, and ask you if that is, to your best knowledge, a general field accounting manual?

A. To the best of my knowledge it is. That is what we are operating on.

Q. And that is the type of the one you were operating under in 1947? A. That's right.

Q. I presume that the Standard Oil Company supplies you with a continuation of open leaf revisions from time to time? A. That is right.

Q. But this manual has always remained in your department at Wells? A. That is true.

Q. After you got a manual?

A. That is right.

Mr. Wilson: I wish to offer Plaintiff's Exhibit 26 in evidence.

Mr. Vargas: If the Court please, as far as the defendant Odermatt, we object on the ground it is

(Testimony of E. J. Odermatt.)

not his manual, it is not binding on him, not prepared or furnished by him, or anything else. [383]

Mr. Wilson: We have subpoenaed one of these from Mr. Odermatt and he did not have it available, so we obtained it from other persons in the department, and we simply offer this as the manual under which he operates with the Standard Oil Company and as a portion of the evidence defining his relationship to the company.

The Court: Objection will be overruled. It will be admitted in evidence Exhibit 26.

Q. Mr. Odermatt, I believe you testified that your relationship with the Standard Oil Company had continued over 16 to 20 years, or some such overall period?

A. That is right. I have been an employee since 1927.

Q. And in your work were you taught, and did you study, the nature of the dangerous materials which you delivered to various dealers?

A. That's right.

Mr. Platt: We object to that question, if the Court please. I do not see its materiality.

Mr. Wilson: The materiality is that this man is a skilled person in handling these inflammable products in the very nature of his work. I don't know of a person better able to discuss the volatility of fluids and the resulting flames and explosions than a man so trained.

The Court: Is he here as your witness or adverse witness? [384]

(Testimony of E. J. Odermatt.)

Mr. Wilson: Well, I wish to make him such a witness that I may ask him questions regarding explosive material like gasolines and how they should be cared for.

Mr. Platt: Your Honor please, I think it may be conceded and admitted that as a matter of general information gasoline and butane and other gasses like that are volatile and are dangerous. Unless counsel wants to qualify Mr. Odermatt as an expert to bring out something about which we have no knowledge yet, I do not see the materiality of this.

Mr. Wilson: Well, I presume that although all of us knows that certain gasoline fluids are highly inflammable, yet we do not observe or consider whether the gasoline burns or whether it is the fumes that burn or what causes ignition sparks, what are the safety rules, and I am sure Mr. Odermatt's relationships are such that he would know the ordinary and fundamental safety rules for delivery of gas. We wish to go into that.

The Court: You may go ahead. Objection will be overruled.

Mr. Wilson: I will strike that question.

Q. Mr. Odermatt, over the period of time or your relationship with the Standard Oil Company, I presume that you read of safety measures in protecting Standard Oil products, you discussed them with others and you also observed safety measures in handling these products, is that correct? [385]

A. That's right.

(Testimony of E. J. Odermatt.)

Q. And is gasoline one of the most dangerous products sold by Standard Oil Company of California because of its volatility?

A. I don't have that knowledge.

Q. Do you have any knowledge as to how a combustion is formed from gasoline fluids or the escape therefrom in air?

A. You mean in the open air?

Q. Yes.

A. Well, you are getting into a pretty wide field.

The Court: Can you answer that question yes or no?

A. I wouldn't know.

Q. Now, Mr. Odermatt, departing from the question of whether or not you know what causes combustion, I presume that you have trained yourself, and have been trained, in the handling of gasolines as sold by the Standard Oil Company?

A. That's right.

Q. And I presume that you instructed Mr. Nielson as to the proper method for him to conduct himself with regard to making tank deliveries to dealers?

A. That's true.

Q. Can you give us the instructions which you supplied Mr. Nielson with regard to handling the Standard Oil products, including gasoline?

Mr. Halley: We object to that on the ground it doesn't [386] tend to prove any material issues in this case.

The Court: Objection overruled. Answer the question.

(Testimony of E. J. Odermatt.)

A. You want all the products, or just what pertains to this case?

Q. Let us confine it to the products, let us say, that were on the truck the day of the fire.

A. The dealer deliveries—in most cases the dealer gives us a standing order to keep him supplied within a safe level, so upon arrival at the dealer's premises, you measure each storage tank to ascertain the amount of gasoline that could be safely put into each tank without causing any overflow, and with that knowledge then he would proceed to deliver. I might mention that the trucks are calibrated by weights and measures, the compartments, and each compartment holds a definite amount that is sealed and designated by the State's Weights and Measure. Therefore we know exactly what is in each compartment. With that knowledge and the knowledge of what is in the tank, we proceed to deliver. Do you want to go on from there?

Q. Just describe what you instructed in regard to his conduct while he was delivering.

A. The usual procedure on delivery is to insert the nozzle into the filler pipe.

Q. Perhaps you are really furnishing me what I wish to know, but I wish to know your instructions. [387]

A. I am telling you. Then a new man you have to tell him how to proceed. To insert the nozzle in the filler pipe. On the end of the nozzle, unless the nozzle is of brass construction, we always have a chain, possibly two feet long, that makes ground

(Testimony of E. J. Odermatt.)

connection with the ground before the nozzle is brought to the filler pipe. Then you connect the hose to the compartment that is designated to be pumped into that particular storage tank. Then on our particular trucks all of the nozzles or faucets are spring-charged; in other words, self-closing. Then the compartment is turned on and the driver is to stay within a safe limit of the truck.

Q. Now, Mr. Odermatt, you for many years, according to your testimony, had a sales operating manual put out by the Standard Oil Company sales operating department, issued in 1938, did you not?

A. As an employee, yes.

Q. And as such you were acquainted and could refer to the contents of that manual?

A. We had it yes, as a reference, yes.

Q. And the manual, of course, goes into the elements of the danger of the Standard Oil products delivered?

Mr. Halley: If the Court please, I believe the manual counsel is referring to was previously offered and on objection the objection was sustained. He is now, I believe, referring to the contents of that manual. [388]

Mr. Wilson: It was objected to but the question at that time was not what Mr. Odermatt knew from the manual to guide him in the disposition of various products, but it was whether or not he was controlled by the manual at Wells in his operation. Now I am using the manual to question him in regard to its products.

(Testimony of E. J. Odermatt.)

The Court: You might do that without referring to it.

Q. Do you recall the contents of the manual?

A. No, I don't. Generally, but as far as the manual is concerned, you have to refresh yourself on it.

Q. Now as a result of your experience, you are acquainted with what will cause a gasoline fire or gasoline explosion, are you not?

A. That's right.

Q. And it is true, according to the Standard Oil experience and your own experiences, that fumes, coming in connection with hot substances, such as an exhaust pipe, can cause fire or explosion?

Mr. Vargas: We object to the term explosion. There is no evidence there was any explosion involving gasoline. As a matter of fact, the witnesses have testified that they heard no noise.

Mr. Wilson: Of course, that is a rather fine point. I think Mr. Vargas wasn't here during the first morning, at which time there was reference made by Mr. Moseley of [389] explosions.

The Court: Objection is overruled. Answer the question.

(Question read.)

Mr. Platt: Your Honor, on behalf of Standard Oil Company, I object to the witness assuming to testify on the Standard Oil's experience.

The Court: I think the question is rather leading—

(Testimony of E. J. Odermatt.)

Mr. Wilson: I am asking for expert testimony here from a man engaged in that business. I have to direct my question toward these possibilities, your Honor, as resulting from the type of case we have.

The Court: Well, proceed.

Mr. Halley: Your Honor, I would like to interpose another objection on another ground. It is assuming something not in evidence here, the question is.

The Court: Objection overruled. Answer the question. Reframe your question.

Q. Mr. Odermatt, from your experiences, as in the handling of Standard Oil gasolines and inflammable products of Standard Oil Company, can you say whether or not a fire or an explosion may result from contact of fumes from Standard Oil gasoline on a hot metal substance, such as a hot exhaust pipe?

A. To my knowledge I have never heard of or witnessed such a fire. [390]

Q. You have never observed such a fire?

A. No.

Q. In your experience and training have you ever heard of such a fire resulting?

A. I answered you that I hadn't.

Q. You never heard of such a fire?

A. That is what I told you.

Q. Mr. Odermatt, when you first heard of this fire, what did you do with regard to notifying any persons, other than some one at your own plant?

A. The first thing I did I drove to Contact to see just exactly what had happened. After exam-

(Testimony of E. J. Odermatt.)

ining this, I reported the fire to my insurance people and to Mr. Warner at Ely.

Q. You notified Mr. Warner at Ely when you returned to Wells? A. That is correct.

Q. Who is Mr. Warner?

A. Branch manager of Standard Oil Company.

Q. What did you do, if anything, with the gasoline that had been delivered that day by Mr. Nielson into the storage tanks at Mr. Herzinger's place of business? A. Just what do you mean?

Q. After the fire?

A. Do you want me to tell exactly what happened?

Q. What did you do, yes, in regard to those products after the fire? [391]

A. Well, at the time of the fire, when I got there, I asked for Mr. Herzinger. They told me he was in Elko, so I waited there until Mr. Herzinger returned, which was about dusk, and at the time he stopped there were several people talking to me. All I did was speak to him and say a word and told him I would talk to him a little bit later on when the people got away, so down in this little wooden building, which was a bar, in the presence of Mr. Nielson, I was talking to Mr. Herzinger.

Q. I was inquiring about what you did with the product.

A. I am coming to that.

Q. That is what I am interested in.

A. And at that time I told Mr. Herzinger——

Q. I just simply wish——

(Testimony of E. J. Odermatt.)

The Court: Can you answer this question?

(Question read.)

A. That is what I am leading to.

The Court: You don't have to lead up.

Q. What did you do with it? A. Nothing.

Q. What did you do the next day after the fire?

A. I was trying to tell you all this and I was stopped.

Q. Just tell us what you did with the products in the storage tank.

A. There was nothing done with the products for several days.

Q. Then what did you do? [392]

A. At the end of several days we went down there with another pumping equipment and pumped the tanks out.

Q. Who did that?

A. I pumped the tanks out in Mr. Moseley's presence.

Q. What did you do with the gasoline?

A. We returned to the company the amount that was delivered that day. As——

Q. That is all I want to know.

The Court: Any cross-examination?

Cross-Examination

By Mr. Platt:

Q. Mr. Odermatt, did you yourself participate in pumping out the gas from the tanks, the gasoline?

A. Yes, sir.

Q. You took part in it? A. Yes, sir.

(Testimony of E. J. Odermatt.)

Q. Can you tell us how much gasoline there was in the so-called first tank that was filled?

A. Well, there was approximately, I would say, 400 gallons in the first storage tank.

Q. Can you tell us how near the top that gasoline was, the top of the tank, before you pumped it out?

A. Between five and seven inches from the top of the storage tank.

Q. From the top? [393]

A. Not from the top of the ground, but from the top of the tank.

Q. In other words, the surface of the gas in that tank was from 5 to 7 inches below the top of the tank?

A. That's correct.

Q. Now did you notice anything about how much gasoline there was in the second tank?

A. There was the same amount approximately. I might tell you this that might help, that in the two storage tanks we pumped out 700 gallons for return which had been delivered on that day. Then Mr. Moseley asked me if I could put the remaining part in the barrels because it was not flowing to them in the storage tanks, so I got some barrels in back of the other buildings and there were two full barrels and approximately half of a third barrel. We moved from the two storage tanks about 830 or 840 gallons of gasoline.

Q. Do you recall, Mr. Odermatt, how near the surface the gasoline in the second tank was to the top of the tank?

(Testimony of E. J. Odermatt.)

A. Well, it was several inches underneath the shell of the storage tank.

Q. Can you state approximately how many inches?

A. I would say approximately the same as the first tank, from five to seven inches.

Q. Where, if you know, were the faucets on the truck that delivered the gas? [394]

A. They were on the right-hand side of the truck.

Q. On the right-hand side? A. Yes.

Q. That is the right-hand side going toward the front of the truck?

A. The right-hand side facing in the same direction that the truck travels.

Q. And was that faucet midway between, or how close between from the back?

A. There were five faucets on the truck. There were four different tanks and five different compartments on that particular truck. Each compartment had its own faucet.

Q. And each one of these faucets was on the right-hand side of the truck?

A. That is correct.

Q. Looking toward the front of the truck?

A. That is correct.

Mr. Platt: That is all.

Mr. Wilson: Your Honor, this is the conclusion of the plaintiff's case, with this one point, that we are going to ask at this time, as soon as Mr. Daly prepares the pleading, to amend our complaint with regard to one item.

Mr. Daly: It is an amendment, if the Court please, to conform with the proof and it is in the amount of the value of the buildings. The allegation is on page 4, the top of the [395] page, \$10,-388.35, and the testimony of Mr. Knapp, the contractor, was \$12,540, according to Mr. Knapp, and that figure should also be changed in the prayer of the complaint, if the Court please, paragraph 6.

The Court: There is no objection to the amendment as to the allegation of the value of the premises just immediately before the fire and the pleading will be amended; the complaint now before the Court will be amended to strike from it all matters having to do with loss of profits and in the prayer for recovery for loss of profits.

Mr. Wilson: That is plaintiff's case.

Mr. Platt: Your Honor please, on behalf of defendant Standard Oil Company of California, I desire to make a motion.

Motion for directed verdict argued in absence of the jury.

Tuesday, February 14, 1950

The Court: The motion is denied. We will be in recess until tomorrow morning at 10:00 o'clock.

Wednesday, February 15, 1950, 10:00 A.M.

Presence of the jury stipulated.

LEE JAMES NIELSON

a witness on behalf of the defendants, being duly sworn, testified as follows: [396]

Direct Examination

By Mr. Halley:

Q. Will you state your name please?

A. Lee James Nielson.

Q. Where do you live, Mr. Nielson?

A. Wells, Nevada.

Q. How long have you lived at that place?

A. All my life, 27 years.

Q. You were born in that vicinity, were you?

A. I was born in Elko.

Q. And Wells is in Elko County?

A. Wells is in Elko County.

Q. During the year 1946 and part of the year 1947 were you employed by Mr. Odermatt, one of the defendants in this case? A. Yes, I was.

Q. When did you first go to work for Mr. Odermatt?

A. Immediately after I got out of the army, in 1941, about March 26th.

Q. And you say when you were discharged from the service? A. Yes.

(Testimony of Lee James Nielson.)

Q. How long had you been in the service?

A. Approximately three years.

Q. In what capacity were you engaged by Mr. Odermatt? A. As truck driver.

Q. Would that be a tank truck?

A. Tank truck. [397]

Q. Did Mr. Odermatt own any tank trucks other than this one truck?

A. At that time he owned just the one truck.

Q. During the period that you worked for him, did he have just one truck?

A. No, about 16 months after that he purchased another tank truck.

Q. Will you please describe the tank truck that you were engaged to drive?

A. A 1942 Ford, six cylinder. It was a flat rack with a couple of compartments. The compartments could be taken off.

Q. How many compartments?

A. There were five compartments on the four tanks.

Q. One tank had two compartments?

A. One tank had two compartments.

Q. And they were attached to the truck by what means? A. Bolts underneath.

Q. What was the capacity of the respective tanks from the cab on back to the end of the truck?

A. The first tank or compartment had 200 gallons and 100 gallons, the next had 300 gallons, and the following two were 200 gallon tanks.

(Testimony of Lee James Nielson.)

Q. What was the construction of the tanks? Can you describe the tanks?

A. I am not sure just what you mean by that.

Q. Well, what were their shape and what equipment did they have on them in the way of facilities for filling tanks?

A. Well, the tanks were about five feet wide and that 300-gallon tank was approximately 3½ to 4 feet long and the two 100-gallon tanks were maybe 2½ feet.

Q. What facilities did they have on them for filling? Where was that facility?

A. In the top there was a round cap, dome cap, that you locked or lifted it in order to fill the tanks. In order to drain the tank, there was a spout at the bottom of each tank that you had to use. There was a spring style lock on it that you had to use a wrench in order to turn the tanks on.

Q. What was the construction of the flat rack truck? Was it wood or steel? A. It was wood.

Q. Had a wooden body?

A. A wooden body, yes.

Q. The valve for moving the tanks you said had to be operated by a wrench?

A. Yes, a spring type valve.

Q. Would you describe that valve?

A. Well, a little square—I don't know what you call it—you had to stick this wrench in and pry down in order to let the gasoline flow freely, then it would lock right over and you could push it back up and the gasoline would turn off. [399]

(Testimony of Lee James Nielson.)

Q. Did you attach a hose to that particular connection when you were unloading gas?

A. Yes, sir.

Q. How was the hose attached, by what facility?

A. Well, the hose has a bronze end and you had to twist the hose quite firmly so you wouldn't lose any gas and use the wrench that you had to pry and press down hard in order to tighten it so the gas would flow.

Q. In other words, in affixing the hose to this valve you just mentioned you use a wrench?

A. That's right.

Q. Was the connection under the hose and also on the tank made of brass?

A. I think they were.

Q. After you had completed your delivery, how would you remove the hose from the tank?

A. Well, you had to use this wrench again in order—first, to turn the spring type faucet, then use another wrench to undo this brass type coupling.

Q. In other words, you had to use wrenches to put it on and to take it off?

A. To undo it and take it off.

Q. I think you explained that by saying so you wouldn't lose any gas?

A. That's right. [400]

Q. Now as of May 3, 1947, how long had you been driving this particular truck?

A. About 12 months—about 14 months, excuse me.

Q. And was that in the immediate vicinity of Wells?

(Testimony of Lee James Nielson.)

A. Yes, that was in that vicinity.

Q. During all of that period you had delivered gasoline to Mr. Herzinger's place near Contact?

A. I do not quite recall during all that period. I did not make every trip, no. I made some of the trips to that place.

Q. Now the connection on the tank for delivering the gas, was on what side of the truck?

A. Facing the rear of the truck. It would be on the right-hand side.

Q. Towards the truck? A. That's right.

Q. The opposite side from the driver's seat?

A. The opposite side of the driver's side.

Q. On the 3rd day of May, 1947, did you have occasion to go to Mr. Herzinger's place?

A. I did.

Q. That is known as what?

A. Mineral Springs.

Q. And for what purpose did you go there on that day?

A. To deliver gasoline to Mr. Herzinger.

Q. From what point had you left, from Wells?

A. Yes.

Q. That is where Mr. Odermatt has his place of business? A. Yes.

Q. When you left Wells how much gasoline did you have on your truck?

A. A thousand gallons.

Q. You had all the compartments filled?

A. Yes.

(Testimony of Lee James Nielson.)

Q. Do you recall what time of the day you left Wells to go to Mineral Hot Springs that day?

A. Not exactly. It was approximately eleven o'clock.

Q. Where were you going to deliver gasoline that you had on the truck, this thousand gallons?

A. To Mr. Herzinger, Ray King's, the State Highway.

Q. The State Highway Department?

A. The State Highway Department.

Q. That is one of their division plants out there?

A. That's right.

Q. Where is that from Ray King's?

A. Directly across the highway from Ray King's place.

Q. That is how far from Mr. Herzinger's?

A. About a mile and a half.

Q. You had gasoline for Mr. Herzinger and the Highway Department, is that right?

A. Yes. [402]

Q. After leaving Wells where did you go direct?

A. Direct to Ray King's place—excuse me, Mr. Herzinger's place.

Q. That was the first stop you made for delivery of gasoline? A. Yes, sir.

Q. When did you arrive there on that day?

A. It was a little after 12 o'clock, but I couldn't say just what time it was.

Q. It was shortly after noon of that day?

A. Shortly after noon.

(Testimony of Lee James Nielson.)

Q. When you arrived at Mr. Herzinger's place, where did you stop the truck first?

A. I stopped inside—it would be under the canopy next to the door.

Q. Would you please step to the board—by the way, are you familiar with this diagram? For your information that diagram was drawn by Mr. Moseley. Can you orient yourself? Is that a reasonable replica of the shape and buildings and respective positions? A. Yes.

Q. There is a 16x16, so labelled, canopy. You say you drove under the canopy. Is that what you had reference to? A. Yes, under the canopy.

Q. From what direction were you coming?

A. Well, coming from the south, headed north.

Q. From the south to here, north?

A. Headed north.

Q. Which way did you drive your truck under the canopy?

A. Well, this is the highway, drove it in this direction.

Q. You drove in from the south?

A. That's right.

Q. And first entered the south end of the canopy, is that right? A. Yes.

Q. Where is the filler pipe on the inside tank, as you remember?

A. As you went to the grocery store door, it is to your right, approximately two feet from the door.

Q. To the right as you entered the door?

(Testimony of Lee James Nielson.)

A. That's right.

Q. In other words, to the south of the door?

A. To the south of the door.

Q. Will you make a mark where you recall the filler pipe was?

A. Well, I would say approximately right here.

Q. How close to the door is that?

A. Approximately two feet from the door.

Q. Two feet south of the door?

A. Two feet south of the door.

Q. Is the opening elevated from the ground?

A. The filler pipe itself? [404]

Q. Yes.

A. No, the filler pipe comes just about an inch above the ground.

Q. Where is the vent for that tank, if you know?

A. It is inside the cap and it is a pipe within a pipe.

Q. In other words, the filler pipe and the vent are more or less together, is that right?

A. That's right.

Q. Can you draw a diagram of that pipe?

A. This is a steel wire, this is the air vent, this is where your gasoline goes.

Q. The "x" you have marked, that is the actual filler pipe?

A. That is the filler pipe for gasoline.

Q. And the outside rim is——

A. The air vent.

Q. That is the vent? A. Yes.

Q. I wonder if you could draw another diagram

(Testimony of Lee James Nielson.)

showing how the filler pipe and the vent enters the tank? You say it is a pipe within a pipe?

A. From the pipe straight down. I don't know where the tank is, because I have never seen the tank.

Q. You have one pipe here. Is there another pipe?

A. Yes, there is another pipe here like this, that goes down. This is your air vent. This is where you fill. [405]

Q. In other words, gasoline fills in here and the vent comes up the other side, is that true?

A. Right in here.

Q. And the vent is likewise about an inch above the ground, is that true?

A. About an inch above the ground.

Q. Would you mark the position of your truck when you were at the first tank, the approximate position of your truck? Mark that "NT."

A. Well, I drove up in this direction and I came approximately in here. That is as far as I could get. It could have been a little bit farther, but that is approximately where it is.

Q. You say that is as far as you could get it in? What do you mean by that?

A. There was another car parked in through here and I didn't want to get too close to that.

Q. On the north side?

A. On the north side, a fellow was in under the canopy.

(Testimony of Lee James Nielson.)

Q. In other words, that blocked you from going clear through? A. That's right.

Q. Just mark that truck "NT." What did you do after you drove your truck in there?

A. I got out on this side of the truck, the driver's side.

Q. The left side?

A. Left side, and walked around, and I walked around and you [406] can see in through the door, walking through here, and I proceeded on to the truck in order to take off the gasoline.

Q. Did you shut that truck off before you got out? A. Yes, sir, I did.

Q. Is there a measuring stick there?

A. It usually lies on two barrels and was right in here.

Q. That would be in front of the north side of the bar?

A. The north side of the bar and south side of the grocery store.

Q. Did you do anything with that measuring stick? A. I measured both tanks.

Q. And you had done that before on other occasions?

A. Every occasion we measure the tanks.

Q. You were familiar with the calibration on the stick, were you? A. That's right.

Q. After you measured those tanks, just what did you do?

A. I found out I could leave 700 gallons safely

(Testimony of Lee James Nielson.)

in the two tanks, so I proceeded to hook up the tanks.

Q. You hooked up one tank to the inside underground tank?

A. Yes, the tank here. The first 200-gallon tank, this is right here.

Q. And did that take all of the 200 gallons?

A. Yes. It took that and it had room left.

Q. Did you put any more gasoline from your truck into the [407] inside underground tank?

A. Yes, on measuring this tank I found this tank would hold better than 300 gallons and so after I finished filling this tank, I proceeded with the 300-gallon tank in order to drain a little bit out of that into this one.

Q. About how much of that tank did you drain into that tank?

A. Approximately—I had no way of counting—approximately 20 to 30 gallons.

Q. After you did that, what did you then do?

A. After I drained in here?

Q. Yes.

A. I turned the hose off, disconnected the hose, and held the hose to drain the gasoline out of the hose, so I could hook the hose on the side.

Q. What did you do with the hose after you drained it?

A. I put it on the side of the truck, put it right in here, right on the side of the truck there.

Q. Then what did you do?

A. I got in the truck and backed out.

(Testimony of Lee James Nielson.)

Q. Why did you back out?

A. Because I couldn't proceed through the canopy because it was blocked by this other car.

Q. By the way, what kind of car was it on the north side of the canopy?

A. Thirty or '31 Model A. [408]

Q. Ford? A. Ford.

Q. You backed up toward the south, is that right?

A. Backed to the south and drove it this way. Of course, that is very unusual, backing up.

Q. What do you mean?

A. You have very poor vision on this side of the truck. You usually go around and drive in.

Q. That is what you normally do?

A. That is the normal procedure.

Q. But your progress was blocked?

A. My progress was blocked.

Q. You backed your truck to the south and then proceeded north again to the outside of the canopy? A. The outside of the canopy.

Q. Was your truck parallel to the canopy then, and the pumps? A. Yes.

Q. For your information, Mr. Nielson, the two round circles I am pointing to have been designated as gasoline pumps. Were there two pumps there?

A. There were two pumps there.

Q. There was an underground tank beyond the canopy to the west, is that true? [409]

A. Yes.

Q. What was the construction of that filler pipe?

(Testimony of Lee James Nielson.)

A. It came out about 14 inches above the cement block.

Q. It was 14 inches above the foundation?

A. Yes, the island.

Q. And about how far above the ground itself, the ground level, was the opening to the filler pipe?

A. Oh, it was two or three inches. The island is two or three inches high, maybe four inches high.

Q. And that was about 14 inches above?

A. About 14 inches above.

Q. Do you know where the vent for that particular tank was?

A. It was up close here—I am not positive of the exact location, but it did go right up under the canopy.

Q. Now I show you defendant's Exhibit O-A, which has been identified as a photograph of these improvements here prior to the fire, and ask you to look at that and see if you can find the vent pipe in the photograph. If you find it, point it out to the jury, if you would please.

A. I think this right here, shows center post—there is a little pipe and right on the side of it.

Q. Would you mark that in ink? (Witness complies.) I might ask, while the jury is looking at the picture, does that vent terminate under the canopy, do you recall?

A. It is under the canopy, yes, sir. [410]

Q. It didn't go through it?

A. No, it didn't go through.

Q. Likewise while the jury is looking at the

(Testimony of Lee James Nielson.)

picture, will you draw on the board a diagram——

The Court: I think you should wait until the exhibit is examined by the jury so you will have the attention of all the jurors.

Q. Mr. Nielson, prior to moving your truck from under the canopy, did you go into the grocery store here?

Mr. Parry: I wonder if counsel would refrain from asking leading questions on these material points?

Q. Did you go into the grocery store?

Mr. Parry: Again I object. That is a leading question.

The Court: Objection overruled. Answer the question.

A. I am not quite clear at the time whether I had started my second delivery.

Q. After you completed your delivery to the inside tank, did you do anything before putting your truck in reverse and going out to the other side of the canopy?

A. Yes, I did; disconnected my hose and drained the hose.

Q. After that did you do anything?

A. I got in my truck and backed out.

Q. And went out to the outside. After you got to the outside of the canopy, what did you do? [411]

A. After I arrived on the outside, I turned the motor off and got out of my truck, walking to the rear, took the hose off the truck first by inserting

(Testimony of Lee James Nielson.)

the nozzle into the filler pipe and then hooking up this fitting with the truck. Drained it.

Q. Hooking up the fitting on the hose to the tank on the truck did you use any wrenches that you described?

A. Yes, used the regular wrench.

Q. You hooked it first to what tank on the truck?

A. On the outside. I hooked it to the second tank, the 300-gallon tank that I had already taken some gas out of.

Q. I believe you said you used the measuring stick to determine the amount of gasoline that you could safely pump into the outside tank, is that right?

A. Yes.

Q. How much gasoline did you determine you could put into that tank at that time?

A. That tank was empty at the time. It wouldn't pump. They told me it wouldn't pump.

Q. You had been informed it wouldn't pump?

A. I had been informed by one of them it wouldn't pump?

Q. By somebody in the place? A. Yes.

Q. And you measured it too? [412]

A. That's right, I measured it too.

Q. How much gas would it take? Do you know the capacity of that tank?

A. The outside tank is 520 gallons.

Q. Right after you connected your hose to this 300-gallon tank, what did you then do?

A. I continued to fill the tank with gas.

Q. From that particular tank?

(Testimony of Lee James Nielson.)

A. From the second 300-gallon tank.

Q. Did you empty that tank? A. Yes.

Q. Into the outside tank?

A. Into the outside tank.

Q. How long did that take, if you know?

A. It took approximately between 10 and 15 minutes to drain.

Q. Was there any overflowing or spilling at that particular point?

A. No, no overflowing or spilling.

Q. After you had drained that tank from your truck, what did you then do?

A. I hooked up the next to the last 200-gallon tank.

Q. That is next to the last in the rear?

A. That is in the rear, yes.

Q. The 200-gallon tank?

A. 200 gallons. [413]

Q. And describe the manner in which you hooked that up.

A. Well, first I turned off the lines and disconnected the hose and went through the same procedure and was sure it was right and then opened the faucet of the second tank.

Q. Did you use the wrench again?

A. Used the wrench again.

Q. And then you turned on the faucet?

A. Yes, I turned on the faucet.

Q. What is the capacity of that tank?

A. 520 gallons.

(Testimony of Lee James Nielson.)

Q. The tank on your truck that you were draining?
A. 200 gallons.

Q. And that is second to the rear?

A. Next to the rear.

Q. What did you do after you turned on the faucet?
A. On the last tank?

Q. Yes. A. I waited for it to drain.

Q. How long did that take to drain?

A. Oh, 8 to 10 minutes approximately.

Q. Did you notice whether there was any spilling or leaking of gasoline?

A. No, sir, there was no spilling or leaking of gasoline.

After that tank drained, what did you then do?

A. Disconnected the hose, turned it off and disconnected the [414] hose.

Q. How did you disconnect it?

A. I had to use a wrench again to disconnect the hose.

Q. After you disconnected the hose, what did you then do?

A. Held the hose high to be sure there was no gas, in order to drain the tank for safety before proceeding to make up the invoice.

Q. After you drained the hose, what did you do?

A. I laid the hose down alongside the cement island.

Q. After you did that, what did you do?

A. I proceeded inside to make up the invoice for the fill.

(Testimony of Lee James Nielson.)

Q. By that invoice for the fill, do you mean the charge to Mr. Herzinger?

A. Charge to Mr. Herzinger.

Q. He had a charge account with the Standard Oil, did he? A. Yes.

Q. What is the height, Mr. Nielson, of the fixture on the tanks to which you affix the hose from the ground?

A. Approximately 3½ to 4 feet high. That is the fixture of the tank.

Q. Above the ground?

A. Above the ground, that's right.

Q. Is that about the height of the flat rack from the ground? A. That's right.

Q. When you went inside, did you see anybody in there? [415] A. Yes, I did.

Q. Who did you see?

A. Mr. Moseley was behind the bar. Mr. Klitz was sitting at the end of the bar.

Q. What end?

A. That would be the east end of the bar.

Q. Down here?

A. Not the lunch counter, the bar itself.

Q. The bar here? A. Yes.

Q. Was anybody else in there that you noticed?

A. Mr. Bill Hack was sitting at the door.

Q. The door of what? A. Of the bar.

Q. On what side was he sitting?

A. North side of the door.

Q. Between the door of the bar and the grocery store door? A. That's right.

(Testimony of Lee James Nielson.)

Q. Do you know Mr. Hack? A. Yes, I do.

Q. Where does he live?

A. I don't know for sure where he lives. I know he is there most of the time.

Q. Had you seen him at this particular place before? A. Many times. [416]

Q. Did you ever see Mr. Klitz there before?

A. Several times.

Q. And have you ever seen Mr. Moseley there before? A. Yes, I have seen Mr. Moseley.

Q. Was there anybody else in the bar part of the premises at that time?

A. No, just the four of us.

Q. Did you notice what any of the four people were doing?

A. No. Mr. Bill Hack was seated by the door when I walked in and Mr. Moseley was behind the bar and Mr. Klitz was sitting in the bar.

Q. After you came into the bar, what did you first do?

A. The first thing I did was to take a drink of Pepsi Cola I had bought and then went to the rear of the building and put a nickel in this juke box.

Q. When did you buy this Pepsi Cola?

A. While I was draining the second tank on the outside. After I moved the truck at the outside tank, that is when I first purchased the Pepsi Cola.

Q. Who did you purchase it from?

A. Mr. Moseley.

Q. You went inside the premises to purchase it, did you?

(Testimony of Lee James Nielson.)

A. Yes, the bar came right up next to the west wall and I stepped inside the door and purchased this drink.

Q. While the first tank was draining on the outside? [417]

A. On the outside tank, the remains of the 300-gallon tank.

Q. While you were in the process of purchasing this Pepsi Cola did you see your truck?

A. Yes, you could see the truck. You could see the whole front end from that bar.

Q. There are doors and windows there?

A. Doors and windows.

Q. Did you drink part of the Pepsi Cola at that time? A. When I first purchased it?

Q. Yes.

A. I may have taken a swallow or two.

Q. Then you say you came in to finish it when you came in to make your invoice out, is that right?

A. That's right.

Q. Where did you place your invoice book?

A. It was on the end of the bar by my Pepsi Cola.

Q. And that is the west end of the bar?

A. The west end of the bar.

Q. Where was Mr. Moseley in relation to you?

A. He was still behind the bar.

Q. What part? A. About the center.

Q. Are there any stools in the bar there?

A. There were.

Q. Did you sit on a stool? [418]

(Testimony of Lee James Nielson.)

A. No, sir, I didn't.

Q. Did you have any conversation with Mr. Moseley?

A. Very little conversation with Mr. Moseley.

Q. What was your conversation at that time?

A. I don't rightly recall. I took a drink of Pepsi Cola and walked up and put a nickel in the panorama machine and walked back to the bar.

Q. You walked back to the bar to the place where your Pepsi Cola was? A. That's right.

Q. Did you fill out your invoice?

A. No, I didn't.

Q. Why didn't you fill out your invoice?

A. I put a nickel in the panorama machine and returned then to the bar and this machine started flickering.

Q. The panorama machine started flickering?

A. That's right.

Q. You noticed that, did you? A. Yes.

Q. Where was Mr. Klitz at that time?

A. Mr. Klitz was still sitting at the bar at that time.

Q. Did you notice whether he did anything with relation to the machine?

A. He asked Mr. Moseley if he knew how to fix it and Mr. Moseley said he didn't and he proceeded to go to the machine. [419]

Q. Did you see him look into the machine?

A. I saw him look into the machine.

Q. Had you filled out your invoice then?

A. No, I was watching the machine and took

(Testimony of Lee James Nielson.)

a couple of steps out from the bar to watch it at that time.

Q. To view the machine?

A. To view the machine.

Q. Did Mr. Hack join in any of this conversation?

A. That I don't remember. I don't know whether he did or not.

Q. Did you hear Mr. Hack say anything at that time?

A. Just about that time he hollered, "Hey" and I turned around and noticed the flash of fire next to the window outside.

Q. You noticed the flash of fire next to what window?

A. It would be the right-hand side of the bar looking out on the north end of the bar, looking out the door.

Q. Would you please come to the board here and point out where you first observed this flash of fire?

A. I was next to the bar in here approximately—a big window here, and I seen the flash of fire in here. Mr. Hack hollered, "Hey," and I turned around just in time to see the flash of fire come in and go out.

Q. In what direction?

A. It came out in this direction and back. It came from the north-south and then flashed from south back to the north. [420]

Q. From what point relative to the canopy?

(Testimony of Lee James Nielson.)

A. It was in front of the canopy. It was next to the building here.

Q. Close to the wall of the building?

A. Close to the wall of the building.

Q. Close to the west wall of the building, is that right? A. That's right.

Q. After you heard Mr. Hack say "Hey" and you saw that flash of fire flash back from north to south and south to north, what did you do?

A. I laid the drink on the bar, picked up my invoice book and ran outside.

Q. In what direction did you run? You went out this door?

A. Went out that door and was headed directly west.

Q. How far west did you go?

A. I ran out to the rear of the truck and then got in the cab and drove the truck away.

Q. How did you start the truck? Do you have to crank it? A. No, it has a push button.

Q. You started it that way?

A. Started it that way.

Q. When you ran out the door there toward the west and to your truck, did you observe any further fire?

A. I looked over my shoulder to the north and seen there were flames up in the canopy and it was reaching down towards the [421] truck at the end of the canopy.

Q. To the west? A. To the west.

Q. Toward your truck?

(Testimony of Lee James Nielson.)

A. Toward the truck.

Q. And from above? A. From above.

Q. Did you observe whether or not there was any fire on your truck at that time?

A. There was no fire on the truck at that time.

Q. And you say you drove the truck away. Where did you drive to?

A. Approximately 200 yards or so up the highway, going north.

Q. That would be north? A. That's right.

Q. Can you estimate, Mr. Nielson, the time that transpired from the time you left the door here and the time you had your truck in motion?

A. From the time I left the bar and ran out and drove it off?

Q. Yes.

A. I would say 30 seconds at the most.

Q. About half a minute?

A. About half a minute.

Q. After you drove the truck north and stopped it, what did you then do? [422]

A. I got out of the truck and the first thing I noticed was the top around the fills was on fire.

Q. Will you explain that a little fuller?

A. Your fill, as I explained before, is the cap and in order to fill you have to undo this cap and let it back while you fill your truck. After you fill your truck, you let it back right.

Q. Is there a vent in it?

A. There was a vent in it.

Q. The fire was around that fill?

(Testimony of Lee James Nielson.)

A. Around the fill.

Q. Was that around the tank or the compartment?

A. Well, it was on two or three of them.

Q. Of the fills of two or three tanks?

A. That's right.

Q. In relation to the cab of the truck, what were the location of the tanks?

A. They were on the back of it.

Q. Was one tank immediately behind the cab?

A. Immediately behind the cab, yes.

Q. That was on fire? A. That was on fire.

Q. What other tank was on fire?

A. The next two I think were on fire.

Q. What did you do then when you noticed the fire around the [423] fills?

A. I had to get something to fight the fire with.

Q. What did you find?

A. I found I didn't have a shovel or extinguisher, either one.

Q. What did you do?

A. I ran back up around the building and asked Mr. Klitz and the boys where the extinguisher was to put the fire out.

Q. When you say around the building, that was to the east here, you mean?

A. No. They were 150 yards south upon a little hill and I ran from the truck around, right around to the west side of the building and up this hill.

Q. Down the highway? A. Yes.

(Testimony of Lee James Nielson.)

Q. When you refer to "they," who do you mean—"they were on the hill"?

A. Mr. Klitz, Mr. Moseley, Mr. Verdi, Bill Hack.

Q. Is Mr. Verdi connected with the place, do you know? A. Yes, he worked there.

Q. After you ran around and saw them on the hill, you say you asked them for something to fight the fire with? A. Yes, I did.

Q. Then what happened?

A. They informed me that they had dropped a fire extinguisher back of the building somewhere in the brush, they didn't know [424] exactly where it was. It was back of the building some place.

Q. Then what did you do?

A. I ran back around the building.

Q. To the east?

A. To the east and luckily ran into the extinguisher and took it and ran over to my truck.

Q. What kind of extinguisher was this?

A. It was—I don't know what you call it, quite a large one.

Q. Had you had any trouble locating it?

A. I was fortunate to run onto it.

Q. Did you use that on the truck?

A. Yes, I got it on top of the truck and just about had the fire out when the extinguisher went out.

Q. You used what was in the extinguisher?

A. Yes.

Q. Then what did you do?

A. I had nothing else to fight the fire with, so

(Testimony of Lee James Nielson.)

I had to run clear around again to the top of this hill and asked if they had a shovel and that is when Mr. Klitz informed me there was a shovel in the back of his truck parked in back there and I ran back down and got the shovel from his truck.

Q. Where was this truck parked, if you recall?

A. It was parked down pretty close to the light plant, on a little road that led down to that plant.

Q. You got the shovel from the truck? [425]

A. Yes.

Q. Then what did you do?

A. Proceeded back to the truck and started throwing dirt up. I decided I was just throwing dirt in vain so got and shoveled dirt all around the fills.

Q. Were you making any progress in fighting the fire? A. Very little.

Q. Did any party come along about that time?

A. Mr. Zellioux came along.

Q. Who is Mr. Zellioux?

A. He was employed by the U. C. Land and Cattle Company. He was foreman.

Q. That is the Utah Land and Cattle Company?

A. Yes.

Q. Was he in a vehicle of some kind?

A. I don't recall how he got there. I hadn't paid much attention.

Q. You were fighting the fire?

A. I was fighting the fire.

Q. Did Mr. Zellioux do anything then?

A. The first thing I remember Mr. Zillioux doing

(Testimony of Lee James Nielson.)

was handing me a blanket or canvas to try to smother the fire.

Q. What did you do with it?

A. Proceeded throwing the blanket over the flame and trying to smother the fire. [426]

Q. Did you have any success?

A. He got a canvas and helped me and then we got the fire out by throwing the canvas over the fire and smothering it like that.

Q. Prior to the arrival of Mr. Zilliox had you received any burns on your face or hands or any part of your body, when you were fighting the fire?

A. No, I had not.

Q. Did you after that?

A. Touching those faucets I had a couple of small blisters about my hands and my face was warm from the fire that came from under the blanket and the canvas.

Q. That is the first burn you had, from underneath the blanket? A. That's right.

Q. Was your throat burned in any way?

A. My throat felt awfully dry.

Q. After you and Mr. Zilliox were successful in getting the fire out, what did you then do?

A. We had the fire out in a few minutes and there were quite a few cars around up along the highway. They didn't want to come past the truck, so we decided to move the truck on a little sideways.

Q. Did you do that? A. Yes, we did. [427]

Q. Did you see any other people at the scene of the truck other than Mr. Zilliox at that time?

(Testimony of Lee James Nielson.)

A. Not until after we got down and had the truck parked on this little road.

Q. Who did you see?

A. I think Mrs. McLean came along at that time.

Q. And did you go any place with Mrs. McLean?

A. Yes, she took me over to Ray King's.

Q. In her car? A. In her car.

Q. Do you recall having any conversation with Mrs. McLean?

A. The only conversation I recall with Mrs. McLean, she said my face looked like it was burned pretty bad, had smoke on my face, and I was telling her my throat felt awfully funny, but it was such a short distance we didn't have time to say much.

Q. King's was how far from this place?

A. Approximately a mile or a mile and a half.

Q. Do you recall making any statement to Mrs. McLean at that time, "Terrible, terrible, I shouldn't have left the truck; I shouldn't have gone inside"?

A. No, I don't recall making that statement.

Q. After you got to King's, you were treated for your burns, were you? A. Yes. [428]

Q. By whom?

A. Frances King. She is a registered nurse.

Q. While you were being treated was there any one present other than Miss King?

A. There was, but I don't recall who it was.

Q. Did you see a Mrs. Richards there at that time?

A. I don't recall seeing Mrs. Richards. She could have been there.

(Testimony of Lee James Nielson.)

Q. Do you recall making any statements at that time in substance and to the effect that it had to be the truck's fault, that is, the fire had to be the truck's fault? A. No.

Q. Now, Mr. Nielson, did you make any statement that it was the fault of the truck? Did you ever make such a statement?

A. No, not that it was the fault of the truck.

Q. Did you make any report to Mr. Odermatt?

A. Yes, I did.

Q. When did you make that report?

A. I went into Wells with a man on a truck.

Q. You got a ride into Wells? A. Yes, sir.

Q. Did you ever return to the scene of this fire on that day?

A. After I had reported to Mr. Odermatt, I found him at the Chevy station, or at the station, and he made sure that my burns were all right and then I returned to the fire. [429]

Q. You were able to go back to it?

A. Yes, sir.

Q. What time did you arrive back there?

A. It was approximately 4:30 or so, I don't know for sure exactly.

Q. Did you notice whether or not any business was being conducted at that place at that time?

Mr. Parry: Objected to as immaterial.

The Court: What is the materiality of that?

Mr. Halley: Well, your Honor, they deny they were conducting any business following the fire and we would like to show that at this place of business

(Testimony of Lee James Nielson.)

certain conversations were had with Mr. Herzinger.

The Court: They have taken out of this case the question of profits.

Mr. Halley: That is true.

The Court: So it would be immaterial. Objection is sustained.

Q. Did you see Mr. Herzinger at that place after you returned with Mr. Odermatt?

A. Some time later, yes.

Q. How much later?

A. Oh, maybe a half hour or so.

Q. Where did you see Mr. Herzinger?

A. The first I seen Mr. Herzinger was when he parked his car. [430] He drove in after we arrived there.

Q. He came to the place after you arrived?

A. After we arrived.

Q. Was any conversation had with Mr. Herzinger by Mr. Odermatt in your presence?

A. Mr. Herzinger had very little to say to Mr. Odermatt at that time.

Q. Was there a conversation, if you recall?

A. I don't recall any conversation. He wanted him to talk but he wouldn't.

Q. Mr. Herzinger wouldn't talk?

A. Mr. Herzinger wouldn't talk.

Q. What is your height, Mr. Nielson?

A. Six feet.

Q. You say you lifted up this hose after you disconnected it from your truck. How high did you lift the hose?

(Testimony of Lee James Nielson.)

A. I held the hose tight above my head quite a heighth, to drain.

Q. You held it over your head?

A. Over my head.

Q. And tight? A. That's right.

Direct Examination

By Mr. Platt:

Q. When you held the hose high up over your head, as you [431] have just illustrated, was the hose connected to the truck or disconnected?

A. The hose was disconnected from the truck.

Q. At that time was the flow of gasoline from the truck shut off?

A. The delivery was finished then. It was shut off.

Q. And how long was that hose? What is the length of it?

A. Approximately ten feet long.

Q. And then as I understand further, you took your head as you have illustrated, it was disconnected and the other end of the hose was at the intake of the tank? A. In the filler pipe, yes.

Q. And then as I unedrstand further, you took—correct me if I am not accurate on this—

Mr. Parry: I object to this line of questioning as being leading and this is not cross-examination.

The Court: The objection is sustained.

Q. You say the hose was lying on the ground. When did you put it on the ground?

(Testimony of Lee James Nielson.)

A. After I had drained it and finished my delivery.

Q. What did you do with the other end of the hose before you put it on the ground?

A. The other end of the hose was still in the filler pipe.

Mr. Platt: That is all. [432]

Cross-Examination

By Mr. Parry:

Q. Mr. Nielson, I take it you have lived in or near Wells substantially all your life?

A. I have.

Q. How long a time have you known Mr. Odermatt?

A. Several years. I am not positive, eight or ten years.

Q. This was a '42 Ford, as I understand?

A. '42.

Q. How many miles did it have on at the time of this accident? A. To that I am not sure.

Q. Quite a large mileage, I assume. It had been his only truck; he had used it for a long time?

A. Yes.

Q. How much did a thousand gallons of gasoline weigh? A. That I don't know.

Q. What else did you have on that truck that day beside gasoline?

A. I had a barrel of Blazo, or white gasoline.

Q. How much would that weigh?

A. About 500 pounds.

(Testimony of Lee James Nielson.)

Q. How many gallons would there be in it?

A. Fifty-three.

Q. How much would the empty barrel weigh?

A. That I don't know. [433]

Q. Could you approximate?

A. It would be pretty hard.

Q. Well, you have lifted a lot of those barrels, haven't you? A. Quite a few.

Q. Can you lift them yourself?

A. We don't lift the barrel off the ground.

Q. I mean an empty barrel.

A. Even an empty barrel, we do not lift; we pry.

Q. What would you estimate an empty barrel would weigh? A. Forty pounds.

Q. And the full barrel would weigh how much?

A. Maybe five hundred, in the vicinity.

Q. What else did you have on beside this Blazo?

A. There were two 5-gallon cans of oil, some kind of oil.

Q. What else? A. And I think that is all.

Q. Didn't you have some Flamo on there?

A. I had delivered to Mr. Herzinger some Flamo. I had taken that off the truck.

Q. How much Flamo did you have on there?

A. That I don't recall.

Q. How do you haul that, in a heavy cylinder?

A. That's right.

Q. What do one of those cylinders weigh?

A. Approximately 80 or 90 pounds. [434]

Q. Can you lift those yourself?

A. As I said before, heavy articles like that we

(Testimony of Lee James Nielson.)

don't lift these, we pry or use a brace against them.

Q. When you unload?

A. We roll them off onto the ground from the truck.

Q. This barrel of Blazo and Flamo was on a little rack on back of the truck? A. Yes.

Q. So you had this five compartments of gasoline and this other, is that correct?

A. That is right.

Q. You state you left Wells about 11:00 o'clock?

A. Aproximately 11:00.

Q. You go up a long hill for quite a ways, what they call the summit?

A. The hill is approximately three-quarters of a mile, gradual in slope.

Q. How far is it from Wells out to what they call the summit where you go into Thousand Springs Creek watershed A. Eighteen miles.

Q. For the first 18 miles from Wells then you go up this long hill, up the summit. With little variations that is generally up hill?

A. It is rolling.

Q. And you are going higher all the time? [435]

A. No.

Q. Isn't there a divide between the Humboldt River and Thousand Springs Creek which flows to the east?

A. The Humboldt River, I don't go into that part of the country.

Q. You are in the Humboldt River watershed?

A. The Humboldt River starts at Wells.

(Testimony of Lee James Nielson.)

Q. Wells and the Humboldt River watershed, isn't it? A. I don't know.

Q. And the water and snow melts and falls over in the north of Wells, drains towards Wells, does it not? A. To a certain extent.

Q. Do you or don't you go over a summit 18 miles north of Wells where you go into Thousand Springs? A. Yes, sir.

Q. That summit there is seven thousand feet high? A. That I don't know.

Q. But it is considerably higher than Wells?

A. Well, it is rolling.

Q. I said the summit is considerably higher than Wells, answer yes or no, if you know.

A. I don't know.

Q. When you are coming the other way, from the direction of Contact and Thousand Springs, you go over that summit and you come to these Ruby Mountains and you can't see them until you go [436] over that summit, can you?

A. As I recall you can't if you are coming from north to south, you can't see until you get over the summit.

Q. You have to get pretty close to the top?

A. From a distance, no.

Q. But you agree there is a summit there?

A. That is right.

Q. And then after you go across Thousand Springs valley you go over another summit until you go over the watershed to Salmon Springs hills? I said, you go over another summit?

(Testimony of Lee James Nielson.)

A. I am not sure what you mean by summit.

Q. I mean division between two watersheds.

A. I don't know anything about watersheds.

Q. Do you know anything about a high point that you go over? A. Sure, you go over hills.

Q. And you had a good load on that day coming up there, didn't you? A. Yes.

Q. And you had to shift gears from time to time, didn't you? A. A couple of times.

Q. And you go places in the lower gear?

A. No, you never go below shifting into second.

Q. And places where you drive for quite a long distance in second?

A. Not more than, as I said before, three-quarters of a [437] mile up.

Q. The rest of the way you drive up in high gear then? A. I think so.

Q. And about what time did you get to Contact?

A. It was a little bit after twelve, around noon.

Q. Did you see Mrs. Richards there?

A. No, I did not.

Q. Did you stop there?

A. No, sir, I did not.

Q. And you went up to the Mineral Hot Springs next then, as I understand? A. That's right.

Q. When, after you stopped there at Mineral Hot Springs, did you first go inside?

A. Not until after I had driven my truck to the outside tank.

Q. You first went to the inside tank?

A. To the inside.

(Testimony of Lee James Nielson.)

Q. How many gallons did you put in that?

A. About 200.

Q. You put in 200 because you drained one compartment?

A. Drained one compartment.

Q. How long did that take?

A. Possibly 8 to 10 minutes.

Q. And then you put in some out of the other tank? [438]

A. Approximately 20 or 30 gallons.

Q. Did you guess at that? A. Yes, I did.

Q. And then during all that time you didn't go inside?

A. No.

Q. Did you talk to any one?

A. The only talk I had was Mr. Moseley told me that the outside tank was dry.

Q. Where was he when he said that?

A. He was behind the bar.

Q. Where were you when you talked to him?

A. Walking around the back end of the truck.

Q. When you emptied the first tank, where was the front of your truck with reference to one of the doors to the place?

A. It was about even. The front end of my truck was approximately even with the grocery store door. Could have been a little bit to the north.

Q. How long is your truck?

A. It would have to be a guess.

Q. What is your best estimate?

A. Maybe 16 feet long.

Q. Where were you standing with reference to that truck when you talked to Mr. Moseley?

(Testimony of Lee James Nielson.)

A. I wasn't standing, I passed by.

Q. Passed by what? [439]

A. The rear end of the truck.

Q. What part of the rear end of the truck, corner, back or what?

A. I had to go clear around the truck. I don't remember the exact spot when he told me that.

Q. Where were you when you talked to Mr. Moseley?

A. Going around back end of the truck.

Q. What did you say?

A. I didn't say anything at all.

Q. What did he say?

A. He said, "Hi," and also the outside tank was empty.

Q. That is the first you knew that the tank was empty? A. That is right.

Q. Then what did you do?

A. I proceeded with my delivery.

Q. What did you do with the truck?

A. Left it there.

Q. Have you ever worked at a service station?

A. Yes, I have.

Q. You have filled the tanks of passenger cars, I take it, by pulling a hose, draining your gas into it?

A. By holding the hose and draining the gas.

Q. Into the tank of the passenger car?

A. From the pumps, yes.

Q. Sometimes those will start to bubble up,

(Testimony of Lee James Nielson.)

maybe flow over, [440] even though the tank isn't full?

Mr. Vargas: We will have to object to that, not proper cross-examination. Has nothing to do with the issues of the case.

The Court: Objection is overruled.

(Question is read.)

Q. Is that correct? A. Yes.

Q. And that happens sometimes when you are filling these gasoline tanks?

A. If the air vent isn't right.

Q. It sometimes happens, doesn't it?

A. If the air vent isn't right, yes.

Q. When you come to an empty tank like that outside tank, of course, that naturally is full of vapor, the tank itself, if it doesn't have gasoline, it has some kind of vapor in it, doesn't it?

A. Yes, I guess it has.

Q. And as you pour the liquid into the tank, of course, that forces that vapor out, doesn't it?

A. Correct.

Q. And it is the vapor from gasoline which is the explosive or inflammable part of it, isn't it?

A. That would have to be a guess. I am not positive of that question. [441]

Q. Did you ever run an automobile?

A. I have.

Q. Ever fool with the carburetor?

A. Very little.

Q. But you have some? A. Some.

(Testimony of Lee James Nielson.)

Q. And it takes a mixture of gasoline vapor and air to be explosive, doesn't it?

A. I think it does, yes.

Q. And this vapor that is in one of these tanks is highly inflammable or explosive, isn't it?

A. I guess it is.

Q. And you spent how much time at that outside tank?

A. At the outside tank?

Q. Yes. A. Altogether?

Q. Yes. A. Oh, maybe 25 minutes.

Q. When did you first step in to what we call the bar room of this Mineral Hot Springs place?

A. After I had finished filling the inside tank, drained my hose, put it on the truck, backed out and returned to the outside tank.

Q. That was while the outside tank was running?

A. No, I had finished my delivery. You asked me—— [442]

Q. I said, when did you first step into the bar room?

A. After I connected the truck and started delivery on the second 300-gallon tank.

Q. And while that was running you went in and got the Pepsi Cola? A. That's right.

Q. And you talked some to Mr. Moseley?

A. Yes.

Q. And you were in there for some length of time? A. For only a few seconds.

Q. Well, you were at least there for some length of time? A. Some.

(Testimony of Lee James Nielson.)

Q. You asked for what you wanted to drink?

A. That is right.

Q. And he took the time to get it. Where did he get it from?

A. I think he had it in the icebox right there, right in front.

Q. And then he opened it? A. Opened it.

Q. And you exchanged some conversation there?

A. Yes.

Q. You and Mr. Moseley were at least well acquainted—you had been coming up there once a week or so a good many months? A. Yes.

Q. And you were accustomed to talk when you got up there? [443] A. Right.

Q. And you were friendly? A. Right.

Q. And you chatted with him at least a sentence or two while you were there?

A. Quite possible.

Q. And as I understood you to say, you probably took two or three swallows of your drink while you were in there? A. Right.

Q. And then how long a time after you went outside after that visit was it before you went back in again?

A. I hadn't gone back in until I had finished my delivery.

Q. How long a time was that?

A. Oh, approximately 15, about 15 minutes or so.

Q. When you went back in again, had you done any writing in your book?

(Testimony of Lee James Nielson.)

A. After I made my delivery and returned to the building, I had done no writing.

Q. How much money did you put in this panorama machine? A. One nickel.

Q. Are you sure it operates on a nickel?

A. I am almost sure. It may have been a dime, I am not quite positive.

Q. What position were you facing when you heard Bill Hack holler "Hey"? [444]

A. I was facing east, about three feet away from the bar.

Q. And then you turned around?

A. When he hollered "Hey," I turned.

Q. And as you went out, how did you go around your truck?

A. To the rear of the truck, the south end of the truck.

Q. How many feet do you think you had to run from where you were standing to the point where you got in your truck?

A. Probably 30 or 35 feet.

Q. Do you know the elevation there at Mineral Hot Springs? A. No, I do not.

Q. Do you know the elevation at Wells?

A. Yes, I do.

Q. What is it at Wells? A. 5600 feet.

Mr. Parry: I think that is all.

(Testimony of Lee James Nielson.)

Redirect Examination

By Mr. Halley:

Q. I believe, Mr. Nielson, you stated you had worked in a service station and you know an empty gasoline tank will bubble up sometimes when it is being filled? A. I have seen it.

Q. Do you know whether or not the tank or car, motor vehicle, has a vent in it like these underground tanks?

A. To my knowledge, what vents I have seen in cars are really smaller pipes that could be dented by putting a nozzle [445] into it.

Q. You had been working for Mr. Odermatt for over a year when this fire happened, is that right?

A. That's right.

Q. And you had been delivering to Mr. Herzinger's place? A. Yes, I had.

Q. During that year had you had any experience of these underground tanks bubbling up when they were empty and you were attempting to fill them?

A. No, none whatsoever.

Q. Do you recall the temperature on this particular day, May 3rd, at Mineral Hot Springs?

A. Well, it was quite warm. I would say about, oh, approximately eighty.

Q. Now in proceeding from Wells to Contact and on the Mineral Hot Springs, had you experienced any difficulty with your truck heating?

A. No, none whatever.

Q. Did it heat up at all? A. No.

(Testimony of Lee James Nielson.)

Q. Did you notice whether or not the water in the radiator boiled?

A. Not by the gauge, it wasn't boiling, no.

Q. How long had you been at Mineral Hot Springs when this fire occurred? [446]

A. Oh, I would say approximately 40 or 45 minutes.

Q. During that period of time how long was your truck actually running the motor?

A. As soon as I finished I turned off my truck.

Q. How long was it running in moving it from under the canopy to outside the canopy?

A. Not more than a couple of minutes.

Q. And approximately how long was it standing outside the canopy before the fire?

A. Oh, 30 to 40 minutes, I think.

Q. Did you notice any heat coming from the truck during that period of time? A. No.

Q. I believe you said you delivered some Flamo to Mr. Herzinger's place? Did they have Flamo equipment up there?

A. To my knowledge they did.

Q. What Flamo equipment did they have there?

A. Now I am not positive as to that.

Q. Where is the Flamo tank located on the premises?

A. I think it was on the south side of the building.

Q. Prior to May 3rd, the date of this fire, when had you last been to Contact or Mineral Hot Springs in this particular truck?

(Testimony of Lee James Nielson.)

A. That I don't remember.

Q. Well, would it be a few days? [447]

A. Just a few days, yes.

Q. Do you recall the temperature on that particular day? A. No, I don't.

Q. Where had you made delivery prior to May 3rd?

A. Now I am not sure on that. It could have been both places, Mr. Herzinger's and Ray King's, I am not sure.

Q. Do you remember the weather conditions that day, as to wind, Mr. Nielson?

A. As I recall, it was very still that day, no wind.

Q. Let me ask you this—the flames that were on top of your truck, were they going in any particular direction other than up?

Mr. Parry: Objected to as improper re-direct. I asked no questions on that on cross-examination.

The Court: Objection overruled. Answer the question.

(Question read.)

A. No, not that I recall.

Q. Did you observe the direction of the flames of the burning structure?

A. No, I didn't either.

Mr. Halley: That is all.

Mr. Platt: I have no further questions.

Mr. Parry: No further questions, your Honor.

Witness excused. [448]

JAMES ZILLIOX

a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination

By Mr. Puccinelli:

Q. Will you state your name?

A. Jim Zilliox.

Q. Where do you live, Mr. Zilliox?

A. At present about three-quarters of a mile south of Kimberly in Idaho.

Q. How long have you lived in the State of Idaho?

A. I moved there the last day of April of last year.

Q. That would be 1949? A. That's right.

Q. Mr. Zilliox, prior to that time where did you live?

A. Well, I lived in Montana November, 1914, around Granger, ranching for the Utah Construction.

Q. How long were you employed by the Utah Construction?

A. From 1914, I believe they sold out March, 1945; outside of the first World War about 16 months.

Q. Where were you living on or about the 3rd day of May, 1947?

A. I was in San Juacinto, Nevada.

Q. Where is San Juacinto, Nevada, in relation to the Mineral Hot Springs?

(Testimony of James Zilliox.)

A. Well, it is about six miles, could be 6½, but I would say about six. [449]

Q. In what direction?

A. Pretty near straight north, off the highway about a mile.

Q. And it is about six or seven miles north of Mineral Hot Springs? A. Yes, sir.

Q. About a mile off the highway? A. Yes.

Q. San Juacinto is the headquarters for the U. C. Land and Cattle Company?

A. It is for the north part of the division, San Juacinto headquarters. We had one headquarters at Montello, too.

Q. Mr. Zilliox, do you know Lee Nielson?

A. Oh, yes, at San Juacinto.

Q. Had you known him prior to the 3rd day of May, 1947? A. Yes, sir.

Q. Directing your attention to the 3rd day of May, 1947, I will ask you to state if you saw Lee Nielson on that day? A. Yes, sir.

Q. Where did you see him?

A. Well, he was about 200 yards off the highway of Mineral Hot Springs, trying to put his truck out.

Q. What, if anything, was wrong with the truck when you first saw Lee Nielson, if you know?

A. Well, there was two of the top tanks on fire and he was throwing dirt and all around there with a shovel and pick and [450] I said, "What started the fire?" and he said, "I don't know, Jim."

Q. After you attempted to assist Mr. Nielson in putting the fire out by throwing dirt on it with your

(Testimony of James Zilliox.)

shovel, please state what, if anything else you did to put out the flames on the truck?

A. Well, I went back across the highway. I knew I had a canvas in the back of the truck and by that time my wife drove up from San Juacinto and I ran over to my truck with my own car and got a blanket and got a canvas and put the blanket over the top of the spouts that were burning and smothered it down.

Q. I think you used the word "spouts"?

A. Well, where you put your gasoline in on top.

Q. I will ask you to state, Mr. Zilliox, whether or not any other portion of the truck was aflame or in flames, other than the spouts on top of the tanks?

A. No sir, these two spouts on the top of the tanks is all.

Q. Now at the time you first saw Mr. Nielson and began to assist him by throwing of dirt, I will ask you to state whether or not you observed Mr. Nielson's condition at that time with reference to being burned or not being burned?

A. He didn't have any burns, not then when he was shovelling the dirt.

Q. After you had assisted Mr. Nielson in extinguishing the fire by the use of blanket and this canvas, I will ask you [451] to state if you had opportunity and did observe his condition then with reference to being burned or not?

A. Well, after that it looked like his hands were burned a little, not bad, red, not bad, and also his face was red and had a lot of dirt on it.

(Testimony of James Zilliox.)

Q. Did you and Mr. Nielson complete putting the fire out by the use of this canvas and blanket?

A. Yes, we did.

Q. Then what, if anything, did you and Mr. Nielson do?

A. Well, there were cars standing off the highway, didn't want to go by him, and I got a chain and hook and turned around and backed on to the gasoline truck and pulled it off toward the hot spring of the Hot Springs ranch.

Q. Then, Mr. Zilliox, what, if anything did you do?

A. Well, I got in the truck and went up to the fire to see if I could help them.

Q. Now describe the condition of the premises at the time you arrived at Mineral Hot Springs?

A. Well, I just drove up, and a lot of people around, parked my car on the left side coming south and went around the east side and Ray Ward was there and his wife and two boys and Mr. Moseley was there and Bill Hack and Mr. Klitz and another fellow that worked there, called Junior, I don't know his name, and then a fellow who worked for us called Butch Yaeger, he and his wife worked for the company. [452]

Q. Please state what they were doing.

A. Well, the trailer house was sitting there and I asked Ray why they didn't put it out of the way.

Q. By that trailer house you mean the trailer house which has been designated to the east of the improvements with the letter "T"?

(Testimony of James Zilliox.)

A. Yes, sir.

(Noon recess taken at 11:50 a.m.)

February 15, 1950, 1:30 P.M.

Presence of the jury stipulated.

Mr. Zilliox resumes the witness stand on further

Direct Examination

By Mr. Puccinelli:

Q. Mr. Zilliox, just prior to the recess you were relating having left the place where you moved the truck and having gone to the Mineral Hot Springs. Now upon your arrival at Mineral Hot Springs who, if any one, did you see?

A. Well, there was Bill Hack and Dale Klitz and a fellow named Bill Yeager and his wife, always called him Butch at the ranch, and a guy called Junior and Mr. Moseley and Ray Ward, his wife and two boys. That's all I remember now. There could have been some more.

Q. Upon your arrival please state what, if anything, you did?

A. When I first got there the trailer house wasn't on fire and I asked Ray why he didn't push it out of the way. [453]

Mr. Parry: I object to that as hearsay.

The Court: The latter part may go out, that portion of the conversation with some one there.

Q. By the trailer house you mean this trailer house designated with the letter "T"?

A. Yes, sir.

(Testimony of James Zilliox.)

Q. Now at the time you arrived there, did you have a chance to observe the condition of the buildings?

A. Well, when I first got there the front end of the store was on fire and a good deal of it was caved in, the back end of the saloon wasn't burning, which is where they had this whiskey stored, and that lower building, the oil house, wasn't on fire. That is when it got on fire, when the flame came across to get on the trailer house and we started to put it out, me and Ray Ward.

Q. As I understand your testimony, when you finally arrived there this trailer house was not burning?

A. No, sir.

Q. The oil house was not burning?

A. No, sir.

Q. The rear of the bar was not burning?

A. No, sir, the bar doors wasn't burning.

Q. What other buildings which are designated on this map were not burning at the time you got there, Mr. Zilliox?

A. That oil house and this little building way over there [454] wasn't burning.

Q. Designated as the pump house?

A. Yes.

Q. That was not burning?

A. No, sir.

Q. Now when you arrived there, please state what, if any, effort any one was making to fight the fire?

A. When I got there they were all either drinking beer or whiskey, sitting down, just standing there.

(Testimony of James Zilliox.)

Q. Did you do anything to combat the fire?

A. Yes, sir. I got hold of Junior and asked him where there was a bucket. He said what for, there was no water in the hydrant and I said yes, there was.

Mr. Parry: I move to strike that as hearsay conversation.

The Court: The conversation may go out.

Mr. Puccinelli: Please restrict yourself, Mr. Zilliox, to what you actually did.

A. Well, what I actually done, I got a bucket, Junior got a bucket for me, and I got some water and I told Junior to get on top of the stone building back of the trailer house.

Q. And did you extinguish that fire?

A. Yes, sir.

Q. Where did you get the water from to extinguish the fire?

A. There was a hydrant between the pump house and the store, [455] right outside.

Q. Now who is Junior?

A. I don't know. He worked there. Young fellow between 18 and 20, is all I know. He worked there, they called him Junior.

Q. Prior to the recess you stated on direct examination, Mr. Zilliox, that you pulled the truck off the highway down off the road?

A. Yes, I hooked on with a chain and pulled it off the road.

Q. Why pulled?

(Testimony of James Zilliox.)

A. People standing there, seemed like they were scared it would get on fire so I decided to pull it off.

Q. Was it because of any mechanical defect, the motor wouldn't run? A. No.

Mr. Parry: Objected to—no proper foundation whatever for the questions.

The Court: Objection sustained.

Q. What did Mr. Nielson do?

A. He got in and steered the truck away and I hooked on to my truck and pulled off the road toward the tent house.

Q. Tell me, Mr. Zilliox, how much time, to the best of your recollection, elapsed or passed between the time that you came on Mr. Nielson on the highway and you helped him put the fire out, pulled the truck off, and then you finally got down to the area of the Mineral Hot Springs? [456]

A. Oh, it would be somewhere between 10 or 15 minutes. It could have been a little more.

Q. What is your best recollection, Mr. Zilliox, as to the weather conditions that day, with reference to there being a wind or there not being a wind?

A. Well, I would say there wasn't any wind because smoke and fire was going straight up in the air. Somewhere around, I would say, between 65 and 75 degrees.

Mr. Puccinelli: That's all.

Cross-Examination

By Mr. Parry:

Q. How far was the Ward ranch from the buildings at Mineral Hot Springs?

(Testimony of James Zilliox.)

A. The tent house between a quarter and a half mile.

Mr. Parry: That is all.

FRANCIS HARMER

a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination

By Mr. Vargas:

Q. Will you state your name please?

A. Francis Harmer.

Q. Where do you live, Mr. Harmer?

A. Contact, Nevada.

Q. About how long have you been a resident of Contact, Nevada? A. Eighteen years.

Q. What is your business or employment? [457]

A. Maintenance foreman, State Highway Department.

Q. Approximately how long have you occupied that position with the Nevada State Highway?

A. For 18 years.

Q. You were then stationed at Contact, Nevada, that is, living there, on or about the 3rd day of May, 1947, the day of the fire involved in this action?

A. Yes, sir.

Q. Have you had occasion, Mr. Harmer, to drive from Wells to Contact? A. Yes, sir.

Q. What, if you know, is the approximate elevation of Wells, Nevada? A. 5600 feet.

(Testimony of Francis Harmer.)

Q. And what, if you know, is the approximate elevation of Contact, Nevada?

A. It is 5320 feet.

Q. Now what highway do you travel going from Wells to Contact? A. U. S. 93.

Q. Will you just generally describe the course of the terrain between Wells and Contact driving north from Wells to Contact?

A. Well, there are two summits, the one summit approximately 18 miles north of Contact—north of Wells—and the grade on the south side of the summit, I should judge, isn't much over four per cent, if it is that, and it isn't very long, and then [458] after you top over what we call—

Q. That is 18 miles out of Wells?

A. Eighteen miles. You have six miles of all down hill and after you pass that to where what we call the Thousand Springs and then from there you have another summit with a slight grade, about three per cent, that is five miles long, and then from there clear into Contact, outside of rolling hills, it is all down hill.

Q. From the point last mentioned into Contact, that is with the exception of rolling hills, downhill what is that distance? A. From Contact—

Q. From the point where you last mentioned, where you start down hill to Contact—you said it was down hill with the exception of some rolling hills. What is the distance of that?

A. About 19 miles.

Q. So for approximately some 19 miles south of

(Testimony of Francis Harmer.)

Contact and on in to Contact you are going down hill, with the exception of this rolling grade?

A. That's right.

Q. What is the distance, approximately, if you know, from Contact to Mineral Hot Springs, the property of Mr. Herzinger?

A. Right at a mile and a half.

Q. And is that up hill or down hill or level, or what?

A. There are two slight hills between Contact and the Mineral Hot Springs. [459]

Q. Do you know Mr. Herzinger, the plaintiff in this case? A. I do.

Q. Do you know Mr. Moseley, his manager?

A. I do.

Q. Are you generally familiar with the premises which have been drawn on the board here of Mineral Hot Springs? A. Fairly well, yes.

Q. Have you ever had occasion to look at the electrical wiring system at Mineral Hot Springs?

A. One time when Mr. Brown was there.

Q. Do you recall about when that was?

A. Just prior to the purchase of the place by Mr. Herzinger.

Q. What was the occasion which caused your examination of the wiring system at Mineral Hot Springs at that time?

Mr. Parry: We object to any further testimony along this line.

(Jury excused and argument in the absence of the jury.)

(Testimony of Francis Harmer.)

The Court: I believe the question will be proper so the objection will be overruled.

Presence of the jury stipulated.

Direct Examination

(Continued)

By Mr. Vargas:

The Court: I wonder if we could fix a little more definitely how long?

Q. Do you recall, Mr. Harmer, about when Mr. Herzinger acquired this property from Mr. Brown? [460]

A. That he asked me——

Q. Can you fix approximately the date when he asked you to do the work on the wiring?

A. I imagine it was a month or two before that, I would say.

Q. Before Mr. Herzinger acquired the property from Mr. Brown?

A. Yes.

Q. Now what was the occasion, Mr. Harmer, for your inspection or examination of the wiring system, electric wiring system, at Mineral Hot Springs at that time?

Mr. Parry: We object, too remote, within a month or two.

The Court: Objection sustained.

Mr. Vargas: If the Court please, we would like to be heard on that matter.

The Court: If it was just prior, a few days, I would admit it, but not within two or three months. The ruling will stand.

(Testimony of Francis Harmer.)

Q. After Mr. Herzinger acquired this property, were you ever down or around Mineral Hot Springs?

A. Occasionally I was.

Q. On any of those occasions, after Mr. Herzinger acquired this property, did you observe anything with reference to the electric wiring system?

A. No, I had not.

Q. Now calling your attention to the day of this fire, Mr. [461] Harmer, May 3rd of 1947, will you state whether or not you had on or prior, that is before that date, ordered any gasoline from Mr. Odermatt?

A. I had.

Mr. Parry: Objected to as immaterial.

The Court: Is it preliminary?

Mr. Vargas: Yes, your Honor. I am perfectly willing to state my purpose.

Mr. Parry: I withdraw the objection.

The Court: Answer the question.

Q. You had orders for gas? A. Yes, sir.

Q. Do you recall how much you had ordered?

A. I had ordered a load, what Mr. Odermatt could haul.

Q. That was for the State Highway Department?

A. That was for the State Highway Department.

Q. Now following the fire was there delivered to you any gasoline by Mr. Odermatt?

A. About three days later we unloaded some.

Mr. Parry: Objected to as too remote.

The Court: This is gas being delivered by Mr. Odermatt to the Highway Department?

Mr. Parry: Immaterial—outside the issues.

(Testimony of Francis Harmer.)

Mr. Vargas: It is preliminary. I will state the purpose if desired. [462]

Mr. Parry: If it is preliminary, I will withdraw my objection.

(Question read.)

A. We unloaded the remaining gas that was on the truck.

Q. Was that from the same truck that was there at Hot Springs on the day of the fire?

A. Same truck.

Q. Did you have occasion at that time to observe the general condition of that truck?

A. Yes, sir.

Q. Where was the gasoline unloaded, at what place? A. You mean——

Q. The gasoline you had ordered and was unloaded from that truck?

A. It was unloaded at the maintenance station at Contact.

Q. How did the truck get into the maintenance station at Contact at that time?

A. Mr. Nielson and Mr. Odermatt drove it up to the station that night.

Q. You say that night?

A. That was the night of the fire.

Q. The night of the fire the truck was driven by its own power up to the Highway maintenance station? A. Yes, sir. [463]

Q. And the same day or two days later the gasoline was unloaded?

A. Yes, Mr. Odermatt asked permission to leave

(Testimony of Francis Harmer.)

the truck in the yard and he also told me if I needed some of the gas to take some, if I was short, out of the truck and use it.

Q. While the truck was at the Nevada State Highway Maintenance Station, did you have occasion to observe the general condition of the truck?

A. Yes, sir.

Q. Would you please describe to the members of the jury and the Court the general condition of that truck?

A. Well, the gas tanks on the top was burned and the top portion of the flat rack was charred just a little and the back end of the cab had never been hot enough to blister or burn, just slightly scorched, and there had been no fire under the truck. There were no burned places under the truck. I even looked under the hood and there hadn't been any fire under the engine.

Q. Do you know of what material the flat rack on that truck was constructed?

A. It was constructed of wood.

Q. Did you observe anything with reference to the wiring running to the various lights on the truck?

A. No, not particularly I didn't. [464]

Q. What was the condition of the tires on the truck with reference to the presence or absence of damage from fire?

A. I couldn't see no damage.

Q. Did you observe anything which may have

(Testimony of Francis Harmer.)

been fitted under the bed of the truck, any equipment or anything of that kind?

A. Yes, on the right-hand side of the truck he packed a hose that he delivered the station oil and used for pump purposes, and the hose was intact.

Q. How was that hose under there, was it on a reel, or how was it? A. It was on a reel.

Q. Where was it in connection with the rear wheels?

A. Set just ahead of the rear wheels on the right-hand side.

Q. And will you state whether or not that coil of hose showed any evidence of fire damage or having been on fire at all? A. No, it didn't.

Q. Do you recall, Mr. Harmer, anything with reference to weather conditions on the day of this fire up there? A. The weather conditions?

Q. Yes.

A. It was a cool day, no wind of any degree.

Q. Have you had occasion to observe the unloading of gasoline from this particular truck at the Highway Maintenance Station?

A. Several times.

Q. Will you please describe to the ladies and gentlemen of the [465] jury and the Court the manner in which the hose connection is made for the purpose of unloading gasoline from this truck, if you know?

A. The driver drives up along the side of the building where we have our tank and he never has to check our tank because I always know what our tank will take. When he drives up he always takes

(Testimony of Francis Harmer.)

his hose off the truck and puts the nozzle end into the filler stand and then he has this bronze connection on the other end of the hose, which he passes through his truck and he always puts that on and screws it up as tight as he can with his hands and then they have a wrench, what they call a Standard wrench, and puts that on there and tightens it on down, hits it with his hand generally, to cinch it up tight.

Q. Can you generally describe this Standard wrench, what it looks like?

A. Well, I imagine there are several types of Standard wrenches. The type he uses is similar to the type the fire department uses to put their hose on a fire plug when they go to a fire. The type the fire departments use have a hole in one end and goes over it in a half circle. The type the driver of the truck uses for that type of fitting fitting has a slot on the end that fits on the connection on hinges.

Q. What can you state with reference to the unreeling of the hose from the tank truck?

Mr. Parry: I object to further testimony as to what [466] happened. It is too remote and not connected with the issues.

The Court: Answer the question.

A. They always have this wrench to disconnect the hose.

Mr. Parry: I move the answer be stricken as to what they always have. It is conclusion of the witness and not responsive.

The Court: The motion will be denied.

(Testimony of Francis Harmer.)

Q. Were you at the premises of the Mineral Hot Springs at all on the day of this fire, Mr. Harmer?

A. Yes, towards the last of it I was.

Q. About what time was it when you went up there?

A. I believe around 2:30 to three o'clock.

Mr. Vargas: That is all.

Mr. Platt: No questions.

Cross-Examination

By Mr. Wilson:

Q. Mr. Harmer, you testified, from Wells to Contact there are two summits, one of which you approach on about four per cent grade, the other on three per cent. Now directing your attention to the first summit out of Wells toward Contact, do you recall the altitude of that particular summit?

A. The first one I mentioned 18 miles out?

Q. Yes.

A. No, I don't recall the exact altitude. I would be giving a good guess. [467]

Q. Is it generally uphill from Wells to the summit? A. Well, it is—no, it isn't.

Q. It goes over hills and down?

A. Goes over hills gradually—

Q. And gradually rises to the summit?

A. That's right.

Q. Is that the summit that forms the divide between the Humboldt River and Thousand Springs Creek? A. Yes.

Q. That is called the HT summit? A. Yes.

(Testimony of Francis Harmer.)

Q. The water runs one way on one side and the other way on the other side? A. That's right.

Q. Mr. Harmer, I am going to hand you Plaintiff's Exhibit 27, here marked for the purpose of identification, and ask you if that picture fairly portrays the truck, physical condition of the truck, as of the date of your inspection of the same at Contact? A. Yes.

Q. I am now going to hand you Plaintiff's Exhibit 28, so marked for the purpose of identification, and ask you if that adequately and accurately portrays a picture of the portion of that truck at Contact the date you made inspection of the same?

A. I would say yes. [468]

Mr. Wilson: At this time I wish to offer in evidence, your Honor, Plaintiff's Exhibit 27 for identification and Plaintiff's Exhibit marked 28 for identification.

Mr. Vargas: The defendant Odermatt has no objection.

Mr. Platt: We have no objection.

The Court: The exhibits may be admitted, Nos. 27 and 28.

Q. I believe, Mr. Harmer, you stated there was a hose on a reel? A. Yes.

Q. And that hose was some place on the truck?

A. No.

Q. I hand you Plaintiff's Exhibit 27 in evidence and have you hold it toward the jury and explain, if you can, where that hose was.

(Testimony of Francis Harmer.)

A. Underneath in this box.

Q. That is a box or compartment underneath the truck?
A. That's right.

Q. I might ask you one question which would fit into their understanding of the pictures. Was that box compartment under the truck housing this hose wood or metal?
A. I believe it was metal.

Mr. Wilson: I have no further questions.

Mr. Vargas: If the Court please, I would like at this time to excuse Mr. Harmer temporarily and call Mr. Moseley. [469]

The Court: Does Mr. Platt have any questions?

Mr. Platt: No questions.

The Court: You may be excused.

ROSS FRED MOSELEY

having been previously sworn, testified as follows:

Direct Examination

By Mr. Vargas:

Q. I believe you testified that you were at Mineral Hot Springs approximately a year and a half before Mr. Herzinger took it over?

A. In the summer before he took it over in February.

Q. Mr. Herzinger acquired the property in February of 1946?
A. I believe so.

Q. And you came on the Mineral Hot Springs property first approximately what date?

A. I believe December, 1945.

Q. So you were there some three months before Mr. Herzinger took it over?
A. Yes.

(Testimony of Ross Fred Moseley.)

Q. Who owned it during that time prior to Mr. Herzinger? A. Mr. Brown.

Q. Were there any electric light facilities at Mineral Hot Springs at the time you first went there, when Mr. Brown owned it?

: A. Yes, sir. [470]

Q. In your examination you described and drew on the board the electric wiring system. Is that the system that was there while Mr. Brown owned it and when you first went there?

A. Yes, that's just about the same.

Q. I believe you testified that that system was in the same condition when Mr. Herzinger bought it from Mr. Brown?

A. Well, it had been repaired different times where it needed it, yes, sir.

Q. Do you recall who made any repairs to it?

A. Well, Mr. Harmer did some when Mr. Brown had the place.

Q. Do you recall about how long it was before Mr. Herzinger took it over that Mr. Harmer made the last repairs to the electric wiring system?

A. Well, I presume it was a while before.

Q. It was after you came there? A. Yes.

Q. From the time Mr. Harmer last repaired this electric system up until the time of the fire, did the electric system remain in the same condition?

A. Outside of minor repairs.

Q. Can you detail to me what those minor repairs were?

(Testimony of Ross Fred Moseley.)

A. Well, wire got tangled some place or something interferred with them.

Q. Do you have in mind, Mr. Moseley, any particular time after Mr. Harmer last repaired this system of the wires becoming [471] tangled?

A. There was a time between the bath house and the power house.

Q. Then the minor repairs that you speak of there were repairs to the system between what houses?

A. Between the power house and the bath house.

Q. Between the power house and some bath houses? A. That's right.

Q. Is that the only place where these minor repairs were had? A. To my knowledge.

Q. Then to your knowledge the remainder of the system was the same at the time of the fire as it was when Mr. Harmer last repaired it for Mr. Brown?

A. Well, practically, outside some minor repairs.

Q. Well, you have mentioned minor repairs being made on the line between the power plant and the bath houses. Can you tell me where any other minor repairs were made in that length of time?

A. Well, any place around the grounds where it was necessary.

Q. Do you know of any place that any repair was actually done other than as you have said between the power house and the bath houses?

A. Well, not particular.

Q. Then would it be your testimony, Mr. Mose-

(Testimony of Fred Ross Moseley.)

ley, that with the exception of the untangling of wires or some minor repairs to the system between the power house and bath houses, the rest [472] of the system was in the same condition from the time Mr. Harmer last repaired it to the time of the fire? A. Approximately, yes.

Mr. Vargas: That's all, thank you.

Cross-Examination

By Mr. Parry:

Q. Was the system working satisfactorily the night before the fire? A. Absolutely.

Q. No trouble or anything around there?

A. No.

Q. All appliances and lights working good?

A. All working.

Q. Was it working all right that morning, the morning of the fire? A. Yes, sir.

Q. Did you see any trouble with any of the electrical devices of any kind there? A. No.

Mr. Parry: That's all.

Re-Direct Examination

By Mr. Vargas:

Q. I take it, Mr. Moseley, the electric system was being used then on the morning of this fire?

A. Not the lighting system particularly. The electric refrigerator was going. [473]

Q. So this power system was being used on the morning of the fire?

A. Sure, used all the time.

Mr. Vargas: That's all. I will recall Mr. Harmer.

MR. HARMER

having been previously sworn, testified as follows:

Re-Direct Examination

By Mr. Vargas:

Q. Now, Mr. Harmer, you testified that you had been requested to effect some repairs to the electric wiring system at Mineral Hot Springs a month or two months prior to the time Mr. Herzinger took it over?

A. That is right.

Q. Do you recall who made the request that you do that work?

A. There was an electrician out of Elko that had done some work at the U. C. Land and Cattle Company and Mr. Brown wanted him to do the work for him and I had helped him wire the State houses, so he asked Mr. Brown why he didn't get me to do it because he didn't have time.

Q. Then it was Mr. Brown who requested you to do the work, is that right? A. Yes.

Q. Now in the vicinity of what portion of these premises did you do that last repair job, the vicinity of what buildings? A. Well, he had some——

Q. Just answer the question—in the vicinity of what buildings [474] was the work done?

A. In around the oil house, a corner of what the bar room is and the canopy.

Q. Now at that time will you describe to the ladies and gentlemen of the jury and to the Court

(Testimony of Francis Harmer.)

the condition of the electric wiring in and about the canopy?

Mr. Parry: Again we object, if your Honor please, as too remote and attempt to impeach their own witness. They have called as their witness Mr. Moseley who testified at the time of the fire the wire was in good order.

Mr. Vargas: Oh, if the Court please——

The Court: The objection will be sustained upon the first ground, it is too remote.

Mr. Vargas: That is all.

Mr. Parry: No further questions.

Mr. Vargas: I would like to make an offer of proof if permitted to.

The Court: We can do it some other time.

Mr. Vargas: It may be understood that I may make my offer of proof at some other time?

The Court: Yes, if you remind the Court.

E. A. ODERMATT

having been previously sworn, testified as follows:

Direct Examination

By Mr. Vargas:

Q. Will you state your name? [475]

A. Ernest J. Odermatt.

Q. You have been previously sworn to testify in this case, have you not? A. Yes, sir.

Q. You are one of the defendants?

A. Yes, sir.

Q. Referring to the 3rd day of May, 1947, the

(Testimony of E. A. Odermatt.)

day of the fire involved here, are you familiar with the truck that was used by Mr. Nielson on that day?

A. Yes, sir.

Q. Are you familiar with the mechanical condition of that truck as of May 3, 1947?

A. Yes, sir.

Q. Will you please state to the ladies and gentlemen of the jury and to the Court what the mechanical condition of that truck was on that date, generally?

A. Generally the mechanical condition of that truck was in perfect condition.

Q. Will you state whether or not that there had been, prior to that time, any work, replacements or anything of that character on or in connection with that truck?

A. Somewhere approximately about the first of the year of 1947 that truck was overhauled from the front clear through the back. It had new motor, new transmission, new rear end, and had been completely rebuilt. [476]

Q. Were you at the premises known as Mineral Hot Springs on the day of the fire, Mr. Odermatt?

A. Yes, sir.

Q. About what time did you get there?

A. Well, as near as I can remember, it would be from 4:00 to 4:30, right in that vicinity.

Q. In the afternoon? A. That's right.

Q. Who, if any one, accompanied you to Mineral Hot Springs? A. Lee Nielson.

Q. Where did you and Mr. Nielson leave on that

(Testimony of E. A. Odermatt.)

journey, what point did you depart from to go to Mineral Hot Springs?

A. From Wells, Nevada.

Q. Did you have occasion to observe the physical condition of Lee Nielson at Wells, Nevada?

A. Yes, sir.

Q. Will you state for the ladies and gentlemen of the jury what his condition was with reference to whether or not he had any injuries?

A. Lee was slightly burned about the hands and his face was quite red, his eyelashes were singed, his hair was singed somewhat. I made it a personal point to see that Lee was not seriously injured because he wanted to return to the scene of the fire with me and for that reason I made sure that he was OK before we left. [477]

Q. He did return to the scene of the fire with you? A. That is right.

Q. Will you state whether or not Mr. Nielson went on working the next day? A. Yes, sir.

Q. Now when you got out to Mineral Hot Springs at 4:00 or 4:30 on the afternoon of May 3, 1947, did you see Mr. Herzinger there when you arrived?

A. No, sir, Mr. Herzinger wasn't there.

Q. He came up later? A. Yes.

Q. Did you have occasion to have a conversation with Mr. Herzinger that afternoon or evening?

A. Yes, I did.

Q. Where did that conversation occur?

A. I first attempted to have a conversation with

(Testimony of E. A. Odermatt.)

Mr. Herzinger when he drove up and stopped in front, well, I guess it was what would have been the old bar room, and there were quite a few people gathered around there and he stopped and everybody moved up to where he was, so I didn't have any conversation. I didn't speak to him at that time.

Q. Now the conversation you had with him was after his original appearance on the scene?

A. That's right.

Q. Where did that conversation take place?[478]

A. The conversation took place down in a building, well, it was a wooden structure just about straight east from the old bar building.

Q. Who was present at that conversation?

A. Mr. Nielson was with me at the time.

Q. Do you recall if any one beside Mr. Herzinger, Mr. Nielson and yourself were present?

A. Mr. Moseley was in the building at the time.

Q. What, if anything, was said as between yourself and Mr. Herzinger and Mr. Nielson at that time?

A. Well, I asked Mr. Herzinger at that time if he had any idea about rebuilding or his plans or anything and he said, "No, I don't have any idea what I will do." I said, "Well, if you think that you are interested in having new equipment, as far as gasoline equipment"—I asked Mr. Herzinger if he was interested in having new gasoline equipment installed and he said, "Oh, I don't know." I said, "Well, any way I am going to report the fire to Mr. Warner if I can get hold of him, as soon as I get back and if he is available we will be up to see

(Testimony of E. A. Odermatt.)

you in the morning," and he said, "All right." That ended that part of the conversation. I told him the hose ends have filling spouts and also one cap was open on the tank, that I would like to screw down with his permission and he said, "I don't care what you do," and with that in mind I went up and wired the fastening inside the cap shut and wired it and removed the [479] spout from the outside and this coil of wire that he has referred to here before answers two purposes, one, it keeps the hose from kinks, second, acts as a binding cable between the truck and the delivery tank during the time you are making your delivery. That is fastened through a friction cap on the machine to each end of the hose fitting. I removed that and the hose ends and this filler pipe that was in the spout and Mr. Nielson was with me and I handed him those ends. Then I proceeded to seal the cap shut on that outside tank. The coil wire, I didn't take it over and throw it into the basement of the bar. I took it over and laid it in the other corner at the front end of the bar, so if I wanted it later on I would know where to find it, and that wire wasn't in the position at the time I left there that the picture shows.

Q. You refer to the picture of the wire?

A. That's right.

Q. Are you still using those fittings?

A. Yes, sir.

Q. That is the fitting that attaches the hose to the tank of the truck? A. That is right.

Q. And the nozzle fittings?

(Testimony of E. A. Odermatt.)

A. That is right.

Q. Where was this hose lying with reference to the gasoline pumps when you first observed it? [480]

A. The hose was lying with the filling spout of the hose in the filler pipe of the tank, lying parallel with the pump block, with the end of the hose, or tank end, coupling end, to the south.

Q. In other words, the hose was in line with the nozzle in the filler tank and then parallel with the island on which the gas pump is located?

A. That is right.

Q. And the end of the hose that connected it with the truck was to the south? A. That is right.

Q. Did you see your truck that day?

A. Yes, sir.

Q. Where did you see your truck?

A. The truck was parked—at the time I got there the truck was on the road that leads down to this tent house that they have referred to somewhere in this testimony. It was off the highway, setting there.

Q. Was it ever moved from that point?

A. Yes, sir.

Q. Do you know who moved it?

A. Yes, sir.

Q. Who? A. Lee Nielson.

Q. Were you present when he moved it? [481]

A. Yes.

Q. How was it moved?

A. It was moved under its own power from that point to the highway maintenance station.

(Testimony of E. A. Odermatt.)

Q. Do you know whether or not at that time there were any fuel gasoline tanks on the truck?

A. Yes, sir.

Q. Was that gasoline which was in the tank or tanks at that time later disposed of?

A. Yes, sir.

Q. How was it disposed of?

A. The gasoline was delivered to the State Highway Department.

Q. Now was there also some icebox oil or something like that?

A. There was some ice machine oil on the back. I think that is the product that Lee had reference to as caloil. It is ice machine oil which is used in a hydraulic hoist that we were taking to the State Highway Department.

Q. Was that particular department delivered that later?

Q. We had two cans on there. For some reason somebody had taken one can off the back of the truck and dumped it in the brush. The can was still there. We picked up the can and took it back to our plant for the purpose of holding it for our auditor so he would know—and the other can was there.

Q. Where was that one that was near the truck?

A. The can in the brush? [482]

Q. Yes. A. It was right close.

Q. And the other can you say the product was delivered to the State Highway Department?

A. That is right.

(Testimony of E. A. Odermatt.)

Q. Will you describe to the ladies and gentlemen of the jury and to the Court the condition of your truck when you first observed it after the fire?

A. Yes, sir. The top back of the cab and on the right-hand side, just a little ways forward, was blistered. The paint on the top of the tank, most of it was burned off. The paint on the left-hand side of the truck, the driver's side, was scorched and burned, I would say maybe that far.

Q. "That far" doesn't indicate anything in the record. What do you say in inches?

A. I would say probably six or seven inches.

Q. That is on the left-hand side?

A. That is right. Then on the right-hand side this pumping unit that we have referred to, we had a suction hose that laid along the side of the truck, that was connected to each one of these five nozzles in the event that we were pumping fuel oil, that hose was burned off.

Q. Right at that point, Mr. Odermatt, I will ask you to take a look at Plaintiff's Exhibits 27 and 28.

A. Yes, sir. [483]

Q. And ask you whether or not there is anything appearing in those pictures with reference to the hose you just mentioned, the suction hose?

A. Yes, in this particular picture here—

Q. Now referring to exhibit 28?

A. Yes—was the suction hose. It wasn't completely burned but the outside casing was burned on that hose, as you can see there. That hose went up this pipe, goes down into the box that contains this

(Testimony of E. A. Odermatt.)

meter and hose and what have you, and I think if you look at that picture you will see the hose attached to that end.

Q. So that portion of the hose which appears as being at least partially destroyed in Plaintiff's Exhibit 28, was lying out along the right side of the top of the bed of the truck?

A. That is right. A portion of what on these exhibits here were the faucets is connected to each compartment of the truck.

Q. Now what kind of lights did this truck have on it, if any?

A. You mean in the way of road lights?

Q. Yes, headlights, tail lights, side lights.

A. Yes, the truck was completely equipped.

Q. Well, describe to me what lights it had on it.

A. It had running or clearance lights and tail lights, headlights, parking lights.

Q. You say it had clearance lights. Where were they?

A. They were on the outside edge of the bed. [484]

Q. From both sides?

A. They were exposed through openings to the front of the bed underneath the bed and to the back the same way, through the side of the bed. There were four lights beside the tail lights.

Q. Four clearance lights? A. Yes, sir.

Q. One of them was under the front corner of the bed on either side? A. That is right.

(Testimony of E. A. Odermatt.)

Q. And the other two were under the rear corner of the bed on either side, is that right?

A. Yes. The tail light was on the driver's side, fastened on the frame.

Q. Where did the wires run that serviced these clearance lights?

A. They run along underneath the bed of the truck.

Q. Were they exposed wires? Were they imbedded in the bed or how were they put there?

A. They were wires which ran—I don't know the exact name of it, but it is a regular wiring loop that these automotive supply houses furnish for that type of wiring.

Q. And the truck had a tail light?

A. That is right.

Q. And a pair of headlights?

A. That's right. [485]

Q. After this fire will you state whether or not all those lights operated?

A. Yes, sir.

Q. They all operated?

A. Yes, sir.

Q. After you delivered the gasoline out of the truck to Mr. Harmer, to the Nevada State Highway Department, what, if anything, was done with the truck?

A. Then the truck was returned to Wells.

Q. How?

A. Under its own power.

Mr. Vargas: That's all.

The Court: Mr. Platt, have you any questions?

Mr. Platt: It has been suggested, your Honor

(Testimony of E. A. Odermatt.)

please, that I interrogate the witness along certain lines, but my recollection is he has already testified as to them.

Q. (By Mr. Platt): May I inquire, Mr. Odermatt, as I understand, did you remove, with assistance, the gasoline remaining in the tanks?

A. Yes.

Q. And when you appeared on the witness stand before, as I recall, did you testify the quantity of gasoline you removed? A. Yes, sir.

Q. And your pumping it?

A. Yes, sir. [486]

Q. And all the incidents connected with it?

A. Yes, sir.

Mr. Platt: That's my recollection.

Mr. Wilson: We don't care to cross-examine the witness.

WILLIAM WARNER

a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination

By Mr. Vargas:

Q. Will you state your name please?

A. William Warner.

Q. Where do you reside? A. Ely.

Q. What is your business or occupation?

A. Manager Standard Oil for the eastern part of Nevada.

Q. About how long have you held that position?

(Testimony of William Warner.)

A. Five years July of this year.

Q. Directing your attention to May, 1947, you then held that position with Standard Oil?

A. That is correct.

Q. Where were you living at that time, May, 1947? A. Ely, Nevada.

Q. Have you ever been to the premises or locality known as the Mineral Hot Springs?

A. I have. [487]

Q. I will ask you whether or not you were there in May of 1947? A. Yes.

Q. With reference to the fire, which is the subject of this action, having occurred on May 3, 1947, were you there shortly after the fire?

A. I was there the next morning.

Q. The morning following the fire?

A. Yes, sir.

Q. Did any one accompany you on that occasion?

A. Mr. Odermatt.

Q. Where did you and Mr. Odermatt come from prior to your arrival at Mineral Hot Springs?

A. From Wells.

Q. About what time did you arrive at Mineral Hot Springs?

A. It was around ten o'clock, between nine and ten.

Q. Who, if any one, was present or around Mineral Hot Springs when you and Mr. Odermatt arrived out there?

A. When we arrived at the scene of the fire the only person near there was a man by the name of

(Testimony of William Warner.)

Mr. Hack, Bill. Mr. Odermatt introduced me to him and he was the only person close to the fire.

Q. Did you see Mr. Moseley there?

A. I saw Mr. Moseley that morning.

Q. Was that after your arrival he appeared on the scene? [488]

A. After looking over the scene of the fire and discussing the thing with Mr. Odermatt and Mr. Hack, I suggested we go down and see if we could find Mr. Herzinger and Mr. Moseley. At that time Mr. Hack said, "I don't believe Mr. Herzinger—

Mr. Parry: We object to testimony which is pure hearsay.

Q. Mr. Warner, you say some time after your original appearance at Mineral Hot Springs you saw Mr. Moseley? A. I did, yes, sir.

Q. Do you know whether or not there was any type of refrigerator unit in what had been the grocery store of these premises? A. Yes, sir.

Q. Had you, prior to this fire, seen any type of refrigerator used in the grocery store?

A. No, I had not. I hadn't noticed.

Q. You first observed it after the fire?

A. I observed it that morning for the first time.

Q. Now were you at any time in the immediate vicinity of this refrigeration unit in company of Mr. Moseley? A. No.

Q. Can you relate to the ladies and gentlemen of the jury and to the Court what, if anything, you observed with reference to this refrigeration unit? What did you see in or about it?

(Testimony of William Warner.)

A. Well—that was the morning after the fire?

Q. Yes. [489]

Mr. Parry: Objected to as immaterial.

The Court: Objection overruled. Answer the question.

A. I noticed as we walked around, we looked at this particular icebox which I identified immediately as being a kerosene ice box, the door was ajar and we felt we better have a look inside to see if it was in use, and it looked like cooked meat in the back of it, what kind I couldn't tell.

Q. Where was that kerosene refrigerator located at the time you examined it?

A. Right next to the door as you entered the same on the left-hand side.

Q. Now I show you Plaintiff's Exhibit 18 and ask you whether or not there is any article portrayed in that exhibit which may be that kerosene refrigerator, which may be?

A. It could be these portions here.

Q. Would you please indicate that part on the photograph by drawing an arrow above it pointing down to it? (Witness complies.)

Mr. Vargas: That is all, if the Court please.

Direct Examination

By Mr. Platt:

Q. Mr. Warner, upon that occasion, the 4th day of May, 1947, when you visited the Hot Springs property you just testified to, did you have a conversation with Mr. Moseley and Mr. Hack at any

(Testimony of William Warner.)

time during that visit? [490] A. I did.

Q. Do you remember about when and where that conversation took place?

A. The conversation with Mr. Hack was at the ruins of the building, of the fire, and the conversation with Mr. Moseley was down at the new location of the bar.

Q. Do you know, of your own knowledge, whether or not Mr. Hack was an employee of Mr. Herzinger? A. Mr. Hack——

Mr. Parry: The question should be answered yes or no.

Q. I just wanted to know if you had the knowledge whether he was an employee of Mr. Herzinger or not. A. In my mind, yes.

Mr. Parry: I ask the answer be stricken.

The Court: It may go out. Can you answer that question yes or no?

A. I was only giving you the information given me that morning of the conversation.

Q. I want to know, did Mr. Hack inform you when you saw him where he was employed, if at all?

Mr. Parry: Object to that as self-serving.

The Court: Objection will be sustained.

Q. Where did you say you had a conversation with Mr. Moseley?

A. It was in the building just east of the ruins of the fire and Mr. Moseley had installed a sort of store room, temporary [491] bar, and that's where we had our discussion.

Q. I wish you would state what that conversa-

(Testimony of William Warner.)

tion was, as nearly as you remember, what you said and what Mr. Moseley said. I wouldn't expect the exact words, but substantially what you said.

A. I told Mr. Odermatt I wanted to go down——

Mr. Parry: That is objected to——

The Court: It may go out.

Q. I just wanted to get the conversation you had with Mr. Moseley.

A. Mr. Moseley was at the bar there and I greeted him, told him I was sorry to hear of the fire and I asked for Mr. Herzinger and he advised me he was in Idaho, and I said, "Well, Mr. Moseley," in a kidding way, "you are already in business at least" and he laughed about it and he said, "Yes, we are in business immediately after the fire, such as it is." So I asked Mr. Moseley, in the matter of conversation, if he knew in his mind what started the fire. He said he did not. And I also asked him if the kerosene ice box in the grocery store was being in use and he said it was necessary to put some cured meat in the ice box and that is practically all that was said. I was anxious to see Mr. Herzinger.

Q. Did you perform any services on that visit with Mr. Odermatt?

A. What do you mean by services? [492]

Q. Well, in order to direct your attention more rapidly, do you know, of your own knowledge, that Mr. Odermatt withdrew from the tanks, the underground tanks, the gasoline there in the tanks?

(Testimony of William Warner.)

Mr. Parry: I take it that is whether he saw it done or not. You can answer that yes or no.

A. What was the question?

(Question read.)

A. Mr. Odermatt asked me if it would be permissible——

Mr. Parry: Just a moment.

Mr. Platt: Just answer the question.

A. No, I did not see it.

Q. If any gasoline was withdrawn from the tanks, you did not see it withdrawn, is that true?

A. I didn't see it.

Mr. Platt: I think that is all.

(Short recess.)

3:15 P.M.

Presence of the jury stipulated.

Mr. Wilson: No cross-examination.

Mr. Platt: Your Honor please, I would like to call Mr. Herzinger for a question or two.

The Court: Yes, sir.

EDWARD HERZINGER

having been previously sworn, testified as follows: [493]

Direct Examination

By Mr. Platt:

Q. Mr. Herzinger, are you acquainted with a man by the name of Hack, whose name has come up here occasionally?

(Testimony of Edward Herzinger.)

A. I have seen him at times.

Q. How well do you know him?

A. Well, I have seen him a number of times.

Q. Has he ever been employed by you at your place?

A. No, he hasn't.

Q. Has he ever performed any services for you at or about Hot Springs?

A. Well, that I couldn't say, not being down there all the time.

Q. Well, to your own knowledge, has he ever performed any services?

A. I have no recollection.

Q. I wish you would step to the blackboard, Mr. Herzinger, and point out, if you will, the location of any windows or doors in the basement.

A. There is only one door, that is there at the back.

Q. Will you mark that with a "V"? Will you tell us approximately the dimensions of that door?

A. You could drive in with a car, so I would say it could be eight or nine feet wide.

Q. How tall?

A. Oh, approximately six feet. [494]

Q. Now in addition to that door, were there any windows in the basement?

A. No, there were no windows in the basement.

Mr. Platt: That is all.

The Court: Any further examination of Mr. Herzinger?

Mr. Wilson: No.

Mr. Halley: I would like to recall Mr. Nielson.

LEE JAMES NIELSON

having been previously sworn, testified as follows:

Direct Examination

By Mr. Halley:

Q. Mr. Nielson, I show you Plaintiff's Exhibits Nos. 27 and 28, which have been identified here as pictures of the Odermatt truck. Do you recognize the pictures? A. Yes, I do.

Q. Now there is some white appearing substance on the edge of the body of the truck on those pictures, do you know what that is?

A. That is foam from the fire extinguisher.

Q. That is from the extinguisher you said you went back and picked up?

A. That I went back and picked up from the building.

Q. In what manner did you spray the foam on that particular side of the truck and on the edge thereof? A. Shall I explain?

Q. Yes. [495]

A. This truck is facing south and I came this direction, this way, and noticed that this hose you see here was afire and I used a little bit of foam on that, trying to put that fire out. Now I went around the truck and got up on top and used the foam and came back, which caused this white substance on the fenders and on the tires.

Q. Now there are some black marks on the tanks on Exhibit 27, could you tell us what they are?

A. Those black marks, that is smoke from this hose that was burning.

(Testimony of Lee James Nielson.)

Q. To your knowledge, was that smoke ever removed from there?

A. Yes, we washed the truck when we returned it to Wells.

Q. After you cleaned the truck and washed it, what marks were on it on the right side?

A. Right along the edge here is a steel rail and that paint on that was blistered a little bit. The paint above the door here was blistered some and a little just above where the hose was was blistered a little.

Q. On the tank? A. On the tank, yes.

Q. This white stuff on the fender of Exhibit 27, was that washed off?

A. Yes, that came from the hose, the high pressure hose, the extinguisher.

Q. You notice the picture of the right rear tire? [496]

Q. What exhibit is that? A. No. 28.

Q. Do you know whether or not that tire was continued in use after May 3rd?

A. It was. We continued to use that tire.

Q. For how long a period?

A. It was quite a while, I don't recall the length of time, but for quite a while.

Q. Well, it was used until what point?

A. Until we had to get a recap or it was worn.

Q. Until it wore out? A. That is right.

Mr. Halley: That is all.

(Testimony of Lee James Nielson.)

Cross-Examination

By Mr. Parry:

Q. Calling your attention to Plaintiff's Exhibit No. 28, you notice certain substance on the tire there? A. Yes, this tire here?

Q. Yes. A. Yes, I do.

Q. Had that truck been driven before these pictures were taken, do you know, between the time of the fire——

Mr. Halley: He doesn't know when the pictures were taken.

A. Not for certain. It could have been taken at the time I [497] went to Ely after the fire.

Q. Did you drive the truck after the fire?

A. That evening yes, I drove it back to the State Highway.

Q. And it had been down on a side dirt road?

A. It was a solid dirt road.

Q. But it was a dirt road? A. Yes.

Q. Then you drove it on that dirt road back up on the pavement and then a mile and a half down to the Highway station? A. Right.

Q. There were some scorched and burned places on that tire on the outside?

A. Not that I recall.

Q. Would you say there were not?

A. No, there were not.

Q. What is your answer, yes or no?

A. There were not.

Q. And there were scorched and burned places on the right side of the truck, were there not?

(Testimony of Lee James Nielson.)

A. On the tanks?

Q. Yes. A. Yes.

Q. And down on that receptacle where the rail runs was paint that was scorched and burned?

A. Underneath that part? [498]

Q. Yes. A. No.

Q. You say there were none down there at all?

A. None down there at all.

Mr. Parry: That's all.

ROSS FRED MOSELEY

was recalled and testified as follows on

Direct Examination

By Mr. Platt:

Q. Mr. Moseley, it has been mentioned, during the course of evidence, a man by the name of Hack. do you know Mr. Hack? A. Yes, sir.

Q. How long have you known him?

A. Oh, about ten years.

Q. How long? A. Possibly ten years.

Q. Was he employed in and about Mr. Herzinger's place at Hot Springs? A. No, sir.

Q. Do you know whether he ever performed any services about the place? A. He never did.

Q. He did nothing in the way of services around the place? A. No.

Q. Do you know whether he was at Hot Springs at the time the fire occurred? [499]

A. He was on the premises.

Q. Where on the premises did you last see him?

(Testimony of Ross Fred Moseley.)

A. Well, I don't know. He was all over the place at various times.

Q. Well, did you ever see him in the bar room?

A. Yes, sir.

Q. Was he in the bar room at the time the fire occurred? A. Not to my recollection.

Q. To the best of your recollection, where in the building was he? A. I couldn't say.

Q. Are you sure he was in the premises within one of the buildings?

A. Well, he was on the premises.

Q. How do you know he was on the premises?

A. Well, he usually was.

Q. He usually was. Did you hear him make any declaration or statement about the flash while he was sitting within the premises? A. No, sir.

Q. Are you sure about that? A. Yes, sir.

Q. Where is he now? A. I couldn't say.

Q. When did you see him last? [500]

A. Oh, possibly two months ago.

Q. Did you see him the day of the fire?

A. He was on the premises the day of the fire.

Q. When did you see him and where, if at all, right after the fire?

A. Well, he was various places around the premises.

Q. As I understand it, after the fire you saw him at various places in and about the premises?

A. That's right.

Q. For how long a time after the fire did you see him in or about the premises?

(Testimony of Ross Fred Moseley.)

A. Oh, he had a cabin there, he was around there possibly a couple of weeks.

Q. Did he live in this cabin?

A. He stayed there.

Q. How long did he stay there?

Mr. Parry: I object; it has been asked and answered. He said about two weeks after the fire.

Mr. Platt: No, I didn't ask that question.

The Court: He may answer the question.

Q. How long did he stay or live in that cabin?

A. From the time he came until the time he left?

Q. Yes.

A. Well, about six weeks, maybe two months.

Q. And you don't know where he is now? [501]

A. No, I wouldn't be in a position to say where he is located.

Q. Have you tried to locate him since the fire?

A. No.

Mr. Parry: Object as immaterial.

The Court: It is already answered.

Mr. Platt: That's all your Honor.

The Court: Any further questions?

Direct Examination

By Mr. Halley:

Q. While Mr. Hack was there for a period of six weeks to two months, Mr. Moseley, what sort of work was he doing?

A. Not anything particularly.

Q. He didn't have a job or position?

A. No, sir.

(Testimony of Ross Fred Moseley.)

Q. Did he from time to time help you clean the place up, now and then?

A. Sometimes he would sweep the floor.

Q. How often would he do that?

A. Not very often.

Q. Well, about how often?

A. Every time you asked him to, if he was in the mood.

Q. How often would you ask him to?

A. Not very often.

Q. What is your best recollection on it, Mr. Moseley?

A. Well, I don't know as I can tell you. [502]

Q. Would that be once a day?

A. I wouldn't say so.

Q. Would it be about every other day?

A. Well, maybe once a week.

Q. Well now would that be the floor of the bar and the grocery store?

A. Well, it might be either one.

Q. Would he ever clean out any of the cabins for you? A. No.

Q. What consideration did you give him for sweeping the floor?

A. Well, he had the cabin there and place to stay.

Direct Examination

By Mr. Platt:

Q. May I inquire, Mr. Moseley, if he paid any rent for the cabin? A. No, sir.

(Testimony of Ross Fred Moseley.)

Q. He had the cabin rent free?

A. That's right.

Q. And who owned the cabin?

A. Mr. Herzinger?

Q. Of course, you kept the books?

A. Beg pardon?

Q. You kept the books of the concern?

A. Yes, sir.

Q. You were the business manager in Mr. Herzinger's absence [503] at least? A. Yes, sir.

Q. And you know he never paid any rent for the cabin? A. Never did.

Mr. Platt: That's all. If your Honor please, I think I can make this statement in the presence of the jury. I do not want to delay the proceedings, neither do I want to anticipate your Honor's rulings, but if we have made sufficient of a showing that Mr. Hack was identified sufficiently with the Hot Springs, we would like to call Mr. Odermatt to testify as to a conversation they had.

The Court: I would say you have not made sufficient showing at this time.

Mr. Halley: I think through Mr. Odermatt we can make a further showing as to Mr. Hack's connection with the place.

The Court: The ruling will stand. The anticipated ruling wouldn't be changed under that set of circumstances. However, I will listen to what Mr. Odermatt has to say.

E. J. ODERMATT

was recalled, and having been previously sworn, testified as follows:

Direct Examination

By Mr. Halley:

Q. Are you acquainted with Mr. Hack, Mr. Odermatt? A. I am. [504]

Q. How long have you known Mr. Hack?

A. Oh, I have seen Mr. Hack in and around Contact for several years.

Q. At what places did you see him in Contact?

A. I had seen him at Mr. Herzinger's and at Mr. King's, both.

Q. And over what period of time did you see him at Mr. Herzinger's?

A. Well, right at the time of the fire he had been around there for some time. I would just be at a loss to say, but I would say a few months.

Q. Prior to the fire? A. That's right.

Q. Did you observe what he was doing around there?

A. I have seen him service cars, fill gasoline in the tanks, take back cases of beer and fill the beer cart and sweep the floor and clean up around the grounds.

Q. How often did you see him work with the beer?

A. Well, as to how often, the only thing I have to offer there is that our trips would be sometimes once a week and sometimes twice a week in there, but during that period of time Mr. Hack was in and

(Testimony of E. J. Odermatt.)

around the premises.

Q. On each trip that you were there?

A. Yes, for a period of two or three months in there, both before the fire and for some two or three weeks after.

Q. On each of your trips did you observe him doing something [505] around the premises?

A. Yes. I wouldn't say just what, but he appeared to be an employee.

Mr. Parry: I object to this.

The Court: It may be stricken, go out.

Q. But on each trip you say you saw him doing something at the place?

Mr. Parry: Objected to as leading and repetitious.

The Court: It has been already answered.

Mr. Halley: We now submit, your Honor, Mr. Hack has been sufficiently identified with this enterprise. We would like to go into the conversation Mr. Odermatt had with Mr. Hack.

The Court: Of course, there is nothing before the Court now.

Q. Did you, following this fire, have any conversation with Mr. Hack? A. I did.

Q. Don't tell us what the conversation was, but where did you have the conversation, when, and who was present?

A. I had the conversation in front of the ruins of the grocery and bar in front of Mr. Warner.

Q. In Mr. Warner's presence?

A. That is right.

(Testimony of E. J. Odermatt.)

Q. And Mr. Hack? [506]

A. That is right.

Q. Was there anybody else present?

A. That's all.

Q. What conversation did you have with Mr. Hack concerning the kerosene refrigerator, if any?

Mr. Parry: We object as hearsay.

The Court: Objection will be sustained.

Mr. Halley: We would like to make offer of proof, your Honor, at the time we make our other offer of proof.

The Court: Of course, you may do so, but as I said to Mr. Vargas, you want to call my attention to it. Any further questions?

Mr. Halley: No further questions.

JACOB A. RYAN

a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination

By Mr. Platt:

Q. Will you state your name, please?

A. Jacob A. Ryan.

Q. What is your occupation or profession?

A. I am a research engineer.

Q. Are you presently engaged in that vocation or occupation or profession? A. Yes, sir.

Q. To what scientific endeavor have you devoted your energies? [507]

A. Well, I began with graduation as a civil

(Testimony of Jacob A. Ryan.)

engineer from the University of Nebraska in 1910. I followed that work, construction, for ten years and in 1920 I went to work for the Standard Oil Company, construction work. I was there only for a few weeks and got into testing work. Testing is a very considerable job, very comprehensive work has to be carried out to see how processes are operating where there are temperatures, pressures, heat flows, vapors, and all such kind of problems.

Q. Do your endeavors include combustion?

A. Yes, and fire prevention and hazards. In the middle 1920's I supervised the conduction of a great many tests which were designed to learn how fires may be started, the flow of vapors, velocity, the composition of vapors that are involved in gasoline and other petroleum products, storage tanks, and all work of a similar nature. That work was carried on quite extensively for three to five years and during the next ten years there was occasionally work in answer to some particular question that would arise. Later that work practically ceased, but I was from time to time called on for consultation in connection with fire prevention and fire hazards.

Q. For how long a period of time, Mr. Ryan, have you been engaged in these professional activities?

A. Well, since 1920, when I first went to work for Standard Oil Company.

Q. Which would be approximately thirty years?

A. Yes.

(Testimony of Jacob A. Ryan.)

Q. What, briefly, are the essential elements of a fire? I mean just as briefly as you can.

A. Well, there must be a combustible material, there must be oxygen and a source of ignition.

Q. Those two elements are essential?

A. Three elements.

Q. Relying on your experience with gasoline and gasoline vapors, will you state whether, in your opinion, spontaneous combustion may arise from an outlet of gasoline or vapors?

A. Not at ordinary atmospheric temperatures.

Q. What essentially are the elements which produce spontaneous combustion?

A. Spontaneous combustion is caused by fairly rapid exhaustion of the combustible material. Such exhaustion will not come in some materials, such as loading oils or coal stacked in piles, at atmospheric temperatures. In addition to the rapid exhaustion which, of course, gives off heat, as all exhaustion of combustible material does, there must be some means to confine the heat, so that the whole mass, or portion of the mass, will be heated to the ignition temperature. Gasoline and gasoline vapors exhaust very slowly until the temperature is at least 500 degrees Fahrenheit, not below 500 degrees Fahr.

Q. Well, in the absence of spontaneous combustion properties of gasoline and gasoline vapors, the limitations that you [509] have expressed, how, from a scientific viewpoint, would it be possible

(Testimony of Jacob A. Ryan.)

to ignite gasoline or gasoline vapors? In other words, would it require some outside agency?

A. Definitely.

Q. In other words, as I understand it, in order to ignite gasoline or gasoline vapors, it would be necessary that an outside agency of fire come in contact with the vapor or the gasoline?

A. Well, heat in some form; we will say a flame or a spark or a hot surface.

Q. A hot surface? A. That's right.

Q. But outside of those three outside agencies, gasoline or the vapors would not ignite?

A. That is correct.

Q. Let me ask you, in your opinion would a spark of an electric motor ignite gasoline vapors?

A. Yes.

Q. Why is that?

A. Well, because it is releasing energy and it is arcing of the electric current between two points and electric arcs are very hot. It is the same principle that is used to ignite your gasoline mixture in your automobile and engine cylinder.

Q. In other words, it takes an electric spark to do it?

A. An electric spark is capable of igniting gasoline vapors. [510]

Q. Well, coming down concretely to this question, let me ask you if any open flame would ignite gasoline vapors, such as a pilot light or a kerosene lantern? A. Yes, it would.

Q. Why is that?

(Testimony of Jacob A. Ryan.)

A. Because it is hot. Even a small pilot flame, any flame that you can see, will have a temperature of probably 1600 to 1800 degrees, which is more than hot enough to ignite fuel.

Q. Well, as a matter of scientific knowledge, does gasoline as such burn?

A. Not as a liquid. It burns only in the vapor state.

Q. Suppose, for instance, I dropped a lighted match in gasoline and there were no emanating vapors, would the gasoline take fire?

A. It would be difficult to drop a lighted match into a channel of gasoline without going through a boundary of vapors which were in inflammable range. Immediately over the surface it would be too rich to burn, just as you drop it into a vacuum.

Q. In other words, if there weren't the surrounding vapors and you dropped a lighted match in the gasoline, the match would go out?

A. That's right.

Q. You are familiar with so-called vents on underground gasoline tanks? [511]

A. Yes.

Q. What is the purpose or the function of a vent?

A. Well, a vent is to allow the escape of the mixed air and gasoline vapors from the top of the tank. When you drop in liquid which will displace those vapors, if you do not have a vent, they would have to work back out of your fuel pipe along your nozzle.

(Testimony of Jacob A. Ryan.)

Q. I want to ask you now, Mr. Ryan, a so-called hypothetical question based, I hope, upon the evidence introduced in this case. Let us assume that a six-cylinder Ford truck, loaded with a thousand gallons of gasoline, also a Flamo cylinder, a few barrels of petroleum products, had travelled fifty miles up and down grade, using second gear at intervals, and assume further that in the course of this 50-mile journey the truck travelled a downward direction or grade and possibly at the end of the journey a two or three per cent elevation or grade for almost three-quarters of a mile; assume further that this truck arrived at its destination to deliver gasoline, that at the time of the delivery of the gasoline the motor of the truck was shut off; assume further that ten minutes elapsed and the truck was again started, backed from under the station canopy to move to a place outside of the pump block and the motor again turned off—I mean the motor of the truck—and twenty to twenty-five minutes more elapsed. State whether or not, in your opinion, the exhaust pipe of that truck, under the [512] conditions mentioned, could possibly have ignited gasoline vapor?

Mr. Parry: To which we object, if your Honor please, upon the ground that the question, as asked, does not correctly state all of the elements to be specified and fails to state some of the necessary elements to be taken into consideration and incorrectly states some of the facts assumed.

The Court: Can you point them out?

(Testimony of Jacob A. Ryan.)

Mr. Parry: One was the assumption was the last grade was about three-quarters of a mile. The testimony is a mile and a half.

Mr. Platt: If you say it is a mile and a half, I will concede that change.

Mr. Parry: I am not testifying, I am objecting. And it fails to insert evidence as to altitude, the temperature, the humidity, and many other elements that are necessary for the witness to express the reason.

Mr. Platt: Of course, your Honor please, there is no evidence here of humidity. There is some evidence of altitude. Should there be any question in the Court's mind—

The Court: To intelligently pass on that objection would require nearly as much expert knowledge as this witness is qualified to give. There is some evidence here in regard to the temperature, but there is no evidence here as to humidity. [513] Now it may be that these matters that are called to our attention by Mr. Parry, matters that are in evidence here, should be included in that question.

Mr. Platt: I submit, as I understand it, from a scientific viewpoint, the only real elements involved here are those elements of evidence I stated to the witness.

The Court: Didn't he say something about heat?

Mr. Platt: He spoke about contact of gasoline vapor to a heated surface.

The Court: Yes, well, we have some evidence

(Testimony of Jacob A. Ryan.)

here in the record of the heat prevailing that day.

Mr. Platt: Let me amplify that question by this statement: There has been some variation in the evidence with respect to heat, but assuming, Mr. Ryan, that the heat on that day was 90 degrees Fahr. I will include that in my question. Also assume that the altitude at Contact, as I recall the evidence, was 5300 feet; also assume any humidity or lack of humidity upon that day and time and occasion. I then ask you, taking into consideration these other elements, whether or not, in your opinion, the exhaust pipe of that truck, under the conditions I have mentioned, would ignite the gasoline vapor? A. No.

Q. Well, what is the reason for that opinion or conclusion?

Mr. Parry: We object to that as improper examination. [514]

The Court: I think the objection will be sustained.

Mr. Platt: Well, if your Honor please, I am quite willing to rely upon the answer of the witness, but it seems to me in fairness to your Honor and to counsel and to the jury——

The Court: I will withdraw the ruling. You may answer the question.

Q. What is the reason for your opinion?

A. Well, some of the items that Mr. Parry mentioned are of minor consequence. Humidity would be very slight consequence, we would say negligible. The effect of the atmospheric temperature would be

(Testimony of Jacob A. Ryan.)

of small moment. The temperature of the hottest part of the exhaust manifold, I think I am able to answer quite accurately.

Mr. Parry: We object to the witness patting himself on the back.

The Court: Objection will be overruled. Answer the question.

A. The gasoline engine normally delivers about 25 to 26 per cent of the energy that is introduced in the fuel to the crank shaft. That leaves, we will say, 73 or 74 per cent of the energy to the exhaust, the exhaust and cooling motor, and in proportion it is split practically 50-50 between the two. That means a little more than one-third of the heat energy that is going into fuel is dissipated in the exhaust. The [515] maximum temperature of gas is 1200 or 1300 degrees. Actually, no point in the exhaust pipe can get that hot because heat is constantly being dissipated by two routes, radiation and reflection. Radiation means that heat energy is transcribed through the air or surrounding atmosphere without being affected by this heat energy. It strikes the hood over the engine, which is heated up and the hood, in turn, loses its heat by reflection. Likewise, the air that passes around the engine through the radiator by means of a fan passes over the exhaust manifold and keeps a temperature difference between the maximum possible temperature of the gas, which we will say is 1200 to 1300 degrees, so as to lower the maximum fuel temperature probably 200 or 300 degrees. That is

(Testimony of Jacob A. Ryan.)

not strictly a conclusion, because I know something about the flow of heat and while the conditions are not ideal, so you can not make an exact computation, you can make an approximate one and I say it would be between 200 and 300 degrees lower than that exhaust gas entering the manifold. Additional computations show me it would take between 20 and 25 minutes for a truck standing at 90 degrees, the exhaust manifold to cool down to 500 degrees, which I have previously mentioned as the temperature below which gasoline content exhausts rapidly enough for spontaneous combustion, and which also is given in some of the insurance companies' manuals, such as the Fire Underwriters and Equitable Mutual Fire Insurance Company. They say gasoline [516] will ignite at 500 degrees, so if we cool the manifold to 500 degrees, we have brought it below the ignition temperature of gasoline. Now coming up a grade the motor would work harder and the temperature would go up and temperature cools very rapidly, more rapidly going down hill than it would standing idle, so that the condition at Contact, where one of these grades, the nearest one I believe, 19 miles from the station, would have been entirely eliminated. Drawing on my own judgment, it would not bring the temperature up more than 300 degrees at the most and that would soon be dissipated.

Q. Let me ask you this further hypothetical question. Assuming in this case that the truck in question was parked west of the pump block and

(Testimony of Jacob A. Ryan.)

close to it, some of the tanks being empty, some full—that is, the tanks on the truck; assume that a light southwesterly breeze was blowing toward the canopy under which there was an outlet or vent from the underground tank; assume further that within a few minutes prior there was put into one of the tanks 470 gallons of gasoline, that tank being a 530 gallon capacity; assume further that the truck was standing in the sun for about 25 minutes and there were discovered flames under the canopy. In your opinion, would these flames ignite the truck or the top of the truck, or how?

A. It would not ignite the truck.

Mr. Parry: That is objected to as a double question and again, I do not think all the elements are included. [517]

The Court: What elements are not included?

Mr. Parry: For the purpose of time, your Honor, I will withdraw that.

The Court: Objection overruled. Answer the question.

A. The vapor at the top of the truck would become ignited.

Q. The vapor on top of the truck?

A. The vapor at the top of the truck.

Q. Right there, in order that I may clarify things as we go along, explain, if you will, how there would be vapor on top of the truck.

A. Well, assume that the truck is standing in the sun. The sun, as we all know, is the source of all heat on the earth and the truck would be absorbing radiant heat from the sun at a rapid rate

(Testimony of Jacob A. Ryan.)

enough to warm up the contents of the truck to raise this vapor and cause additional evaporation of gasoline. That additional gasoline vapor would increase the pressure inside the truck tank and open the release valve, thereby permitting this vapor to flow out. We have assumed a breeze is blowing toward the canopy. That would carry this vapor in that direction. We have assumed a fire under the canopy. That would ignite that vapor, and the stream of vapor from the truck vent to the canopy would serve as a track for the flame to jump back to the truck bed and burn.

Q. Then as I understand it, what would be burning on top of the truck would be the gasoline vapor? [518] A. That is correct.

Q. Let me ask you this brief hypothetical question. Assume that the canopy that we just referred to extends from a building whose door is open, which is east of the canopy and the truck. Assume a light southwesterly breeze was blowing, and assume that the fill of the underground tank was not completed, or was just completed—not completed, was just completed—in your opinion, would any pilot light or moving operating motor or kerosene lantern in the building start a fire under those circumstances? A. It could very readily.

Q. Well, just explain briefly why.

A. Well, we have assumed a breeze first, we have just finished filling the tank, say 470 gallons—

The Court: I am a little in doubt about that,

(Testimony of Jacob A. Ryan.)

Mr. Platt. He is asked a hypothetical question and given his opinion. Now whether he should go any farther or not is a serious question. I am going to strike all he said in explanation of that last opinion and I am not going to permit him to answer this question.

Mr. Platt: Do I understand your Honor's ruling based upon a constituted fact—

The Court: I am not deciding the case, Mr. Platt. He has answered the question and that is it. We [519] are not going to let him go into any explanation. If counsel for the plaintiff wants to cross-examine, that is their privilege.

Mr. Platt: That is perfectly all right. I want to explain to your Honor the reason I asked the witness is simply for the enlightenment of those—

The Court: That is all, and all that answer given a while ago is stricken and the jury are instructed to disregard it.

Mr. Parry: I wonder if we could now move to strike from the record each and all questions which have been given as to reasons subsequent to the answer of your hypothetical question?

The Court: Yes, all answers will be stricken and the jury instructed to disregard or not consider any statements made by this witness in explanation of the opinions he has given here.

Mr. Platt: In other words, your Honor, so I may understand—

The Court: I think that is sufficient. I do not

(Testimony of Jacob A. Ryan.)

want anything more said in the presence of the jury by the defendant. That is sufficient.

Q. Well, here is another hypothetical question, and in accordance with the Court's ruling, Mr. Ryan, I ask you to just merely express your opinion without giving any reasons for [520] your opinion. Assume there is a hot water heater in the basement of these premises, with a pilot light, and the doors and windows placed as they appear on that black-board——

A. (Interrupting): I am sorry, but I couldn't see the board when the witness was pointing out the doors and windows, so would you point them out to me?

Q. Well, assuming, as I understand Mr. Heringer to testify, that there was a door at the east end of the basement, which I had him mark with a "V," this door being eight feet wide, I think, and six feet tall, and I am not sure about this, but I think he testified there was a window in this corner.

Mr. Parry: The testimony is no window.

Mr. Platt: All right, we will eliminate the window, but taking into consideration this door eight feet wide and six feet tall——

A. (Interrupting): That would be only a remote possibility.

Q. (Continuing): ——in your opinion, Mr. Ryan, if there was vapor being conducted on the interior of the building, could a match lighted by

(Testimony of Jacob A. Ryan.)

anybody in the building have exploded the vapor or caused it to take fire? A. Yes.

Q. In your opinion is the vapor inside a gasoline tank inflammable? A. No.

Q. I would like to ask you why, but I can't. There is some [521] testimony here as to bubbling up of the gasoline in an automobile tank that is being filled. Does such bubbling up occur in a gasoline tank or tanks in question here?

A. You mean below ground tanks?

Q. Yes.

A. Not unless the level is up inside the fuel pipe.

Q. That is the level of the gasoline?

A. The level of the gasoline comes up into the fuel pipe inside the nozzle.

Q. Then there would be bubbling?

A. That is right.

Q. Otherwise there wouldn't be?

A. No. I might add a plugged vent pipe might cause that.

Q. Well, assuming that at the time of this fire it was a still day and there was little or no breeze and the temperature was from 80 to 90 degrees. Under those conditions could vapor be carried from under a canopy to a store building behind it?

Mr. Parry: We object to that as an incomplete question and representation; an indirect way to bring out reasons.

The Court: You may answer the question.

A. Yes. I might add that there is no such thing as a day when there is no movement of air, particularly around buildings.

(Testimony of Jacob A. Ryan.)

Q. Who are your present employers? [522]

A. California Research Corporation.

Q. What is their function or their business?

A. They do research work and all kinds of technical work for the Standard Oil Company, of whom they are subsidiaries.

Q. How long have you been employed by this research company? A. Since May 1, 1944.

Q. It has been suggested that I ask you this question. You gave some testimony with respect to the ignition of gasoline vapors by contact with hot surfaces. How hot would such a surface have to be before there would become fire or flame?

A. Well, authorities differ on that. As I mentioned, the Equitable Fire Insurance Company puts out a manual, stating that any surface over 500 degrees shall be considered sufficiently hot to ignite gasoline vapors. The vapors in question are not the whole gasoline; they are the lighter contents of gasoline and have much higher ignition temperatures, from 850 to 1050.

Mr. Platt: That is all.

The Court: Have counsel for Mr. Odermatt any questions?

Mr. Vargas: No.

Cross-Examination

By Mr. Parry:

Q. I take it, Mr. Ryan, you would agree the amount of heat in the manifold and exhaust and internal combustion engine varies with many factors in the operation of that engine?

(Testimony of Jacob A. Ryan.)

A. Primarily with the load. [523]

Q. And also varies as to efficiency with which the engine was working? A. Yes.

Q. In other words, certain factors will affect heat? A. That is right.

Q. And the variables under which an engine will heat are many? A. Right.

Q. So in expressing an opinion as to the degree of heat that has been generated by any internal combustion engine operated under a load for an hour or more, there could be any number of variances? A. Yes.

Q. And under some of those variables that might become quite high?

A. I do not think higher than I mentioned.

Q. You say that is the top ceiling?

A. Yes.

Q. I wonder if you would agree with this statement in the Sales Operating Manual of your employer, the Standard Oil Company, in discussing these three elements of fire that you have mentioned, first it states that open flames will ignite vapor-air mixture and then it goes on: "Other sources of ignition not so apparent are: static electricity, stray currents from defective electric wiring, back fire, ignition spark, or hot [524] exhaust pipe of motor vehicles; * * *." Would you agree with that? Just answer the question. A. Yes.

Q. I would also ask you if you agree with this statement: reading from the same manual—"Gasoline vapors are three times heavier than air." Is that correct or incorrect? A. Incorrect.

(Testimony of Jacob A. Ryan.)

Q. Are they lighter or heavier?

A. Well, there are all kinds of gasoline. I would have to qualify that.

Q. I am talking about gasoline vapor.

A. Vapors vary.

Q. Then you would say the Sales Manual is not correct?

A. It is a general statement.

Q. Is it generally true?

A. No, it is not generally true.

Q. Well, how much of the time is it true?

A. From my knowledge I would say it is seldom true.

Q. What kind of gasoline was being delivered up there at Mineral Hot Springs that day?

A. Just what do you mean?

Q. You said these varied with the kinds of gasoline. Now I want you to tell me what kind was being delivered?

A. Well, the gasoline that was being delivered up there, I would guess—not a guess, I know—was our regular product, the [525] weight of 115 and air weighs 29 and 29 goes into 115 nearly four times, which makes the whole product nearly four times as heavy.

Q. So gasoline is four times heavier?

A. That goes to the subject of high densities which evaporate over the gasoline surface and are much lighter than the whole gasoline.

Q. What is your answer, is vapor that is given off from that lighter or heavier than air?

(Testimony of Jacob A. Ryan.)

A. Lighter than the figure $31\frac{1}{2}$, but heavier than air.

Q. How many times heavier than air?

A. A little more than double.

Q. Now any surface of gasoline that is exposed to this atmosphere, that is air, definitely gives off vapor, does it?

A. Any surface that vapors are carried away from, the surface can't become supersaturated.

Q. But that takes quite a saturation, this supersaturation?

A. Well, the gasoline has a developed pressure, which means there can only be a certain proportion of gasoline vapors in the air. If that proportion immediately above the surface is reached, evaporation ceases.

Q. And as I understand you, you say there is always a movement of air around buildings?

A. That is right.

Q. The range within which a mixture of gasoline vapors and air [526] will ignite is rather small?

A. Rather.

Q. It is quite a while since I looked this up, when there is a mixture of about 95 to 98 air and gasoline? A. Well, it is a little bit wider.

Q. OK, give it to us.

A. If high densities are considered, I figure 1.8 to 8.4 per cent gasoline vapor in air would be normal.

Q. Let us reduce that to percentage of air and gasoline over 100 per cent.

(Testimony of Jacob A. Ryan.)

A. That would be 91.6 to 98.2 per cent.

Q. But it is all in that limited range?

A. That is correct.

Q. And would this vapor pressure be affected differently, say (a) at sea level, and (b) at 5600 feet?

A. Yes.

Q. In what way?

A. The vapor pressure of gasoline is constant. The atmosphere pressure varies with elevation.

Q. So atmosphere pressure would be less with a higher above sea level and be more vapor pressure?

A. That is right.

Q. Have you ever, in your experience, met up with any unexplained fires before?

A. No, I can't say that I have. [527]

Q. You have explained every fire——

A. I have not been out following fires. My work has been on research work, in developing heat and hazards and figuring up ways to reduce hazards.

Q. So then you wouldn't say every fire that has occurred in and around the use of gasoline has been explained?

A. Oh, I would not, by any means.

Q. And you are not here to tell the jury that you can explain this one?

A. No.

Q. And isn't this correct, when you get these three elements together, that is the vapor and the explosive range, and what were those three you gave me, Mr. Ryan?

A. Combustible material, air, and source of ignition.

(Testimony of Jacob A. Ryan.)

Q. We had combustible material and oxygen there, so the question comes to the point of ignition. Now then a fire would have to start at the point of ignition? A. That is right.

Q. And then after the fire starts, it tends to follow this vapor trail of gasoline back to the source of the vapor, does it not? A. That is right.

Q. Metal, when once hot, tends to retain heat for a while? A. It loses quite rapidly.

Q. That is relative? [528]

A. No—well, relative to other products, yes. I might explain metals have very high radiation, which means that they lose heat rapidly and while they are heavy, they have low specific heats.

Q. We talk about the flash point of gasoline. What do we mean?

A. The flash point of gasoline means an arbitrary test that has been set up for the guidance of the vendors and buyers of petroleum products. It is determined in an apparatus in which a standard charge is placed and it is placed over a vat and heated over this vat, heating very uniformly, and at intervals, by temperature rises, a very fine gas flame is applied just above the surface of the liquid and the flash point is the point at which you just barely see that flame swell.

Q. And that means that the vapor is beginning to burn, is that correct?

A. That means that the vapor concentration just above the surface has reached the lower limit of inflammability.

(Testimony of Jacob A. Ryan.)

Q. And reading again from this same Sales Operating Manual, I find the statement: "Gasolines and other thinners have extremely low flash points and will vaporize at temperatures below zero degrees Fahr." Do you agree? A. I do.

Q. So we are dealing with a subject here that had a low flash [529] point? A. Very.

(Offer of proof regarding condition of electric wiring system made by Mr. Vargas; also offer of proof made by Mr. Halley regarding conversation by Mr. Odermatt with Mr. Hack. Offers rejected by the Court.)

(Recess taken at 4:30 p.m.)

Thursday, February 16, 1950, 10:00 A.M.

Presence of the jury stipulated.

JACOB A. RYAN

resumes the witness stand on further

Cross-Examination

By Mr. Parry:

Q. Mr. Ryan, I understood you to say there were certain release valves on top of these compartments, such as used here? A. That is right.

Q. Those operate when the pressure inside of the tank is greater than the atmospheric pressure outside, is that it? A. Right.

Q. And whenever there is a situation so that the atmospheric pressure is less than the pressure inside, the vapors come out of the tank?

(Testimony of Jacob A. Ryan.)

A. That is right.

Q. As I understand you, your work was more on the safety work than on fires?

A. That is correct. [530]

Q. And in the operations of the Standard Oil Company, of course, they have devoted a great deal of time in figuring out safety procedures?

A. Correct.

Q. And instructing every one connected with the company in that respect? A. Correct.

Q. I have been told in previous cases that in the case of a fire started from some source of ignition, it is the first few seconds that count, whether or not you can get it out. Would you agree with me on that? A. That is right.

Q. And that is why in the instruction book it is stated: "When deliveries are being made through tank truck hose, employee must stand at the tank truck faucet or nose nozzle valve until the delivery has been completed." You are familiar with that rule? A. Yes.

Q. And that is an accepted safety rule?

A. Yes.

Q. And this other rule: "During filling operations, either into underground storage tanks or at other containers, it is the employee's responsibility to determine that there are no sources of ignition present." You are familiar with that rule? [531]

A. Yes.

Q. And that is an accepted safety rule?

A. Yes.

(Testimony of Jacob A. Ryan.)

Q. Another part of the same rule: "During filling operations vapors are expelled around the fill pipe or the opening of the container. When making a bulk delivery, be on the lookout for the presence of any one smoking or carrying open lights or other sources of ignition. If necessary, cease the delivery operation until danger has passed." That is a sound safety rule? A. Right.

Q. And one that the company has adopted as a standard operation?

A. It appears in the manual, I believe.

Q. And another one: "Emergency hand extinguishing equipment is provided * * * used when needed." That is a standard safety rule when handling gasoline, isn't it?

A. It appears to be.

Q. And you agree with it?

A. I agree with it.

Q. In other words, their having an extinguisher is the test oftentimes whether you have a fire or not?

A. No, that extinguisher doesn't prevent a fire.

Q. I say if they have an extinguisher, it is the test often of a serious fire or not? [532]

A. It could be.

Q. Often is?

A. I couldn't say how often.

Mr. Parry: That is all.

(Testimony of Jacob A. Ryan.)

Redirect Examination

By Mr. Platt:

Q. Mr. Ryan, the cross-examination has suggested another question on redirect examination. From your hearing and observation of the testimony already offered in this case, is it your opinion that there was any outside agency at the time of the fire at or near the truck which caused the fire?

Mr. Parry: Objected to as not a proper hypothetical question by reference and not proper redirect. I did not go into that on cross-examination.

The Court: I think counsel asked permission to ask another question on direct.

Mr. Platt: I did say redirect, but I can call him on direct.

The Court: Objection overruled. Answer the question.

A. I saw no evidence indicating there was a source of ignition which the operator of the truck——

Mr. Parry: I object to that as invading the province of the jury.

The Court: It is not responsive. Read the question.

(Question read.) [533]

Mr. Parry: I renew my objection——

The Court: Objection will be sustained.

Q. As a matter of opinion, Mr. Ryan, could any fire have emanated in or about the truck without some outside agency, light or fire?

Mr. Parry: Objected to as not stating facts upon

(Testimony of Jacob A. Ryan.)

which it is based. It must be a hypothetical question and it does not state any facts at all.

The Court. Objection will be overruled.

A. I can see no such possibility.

Q. Is there any difference between a so-called flash point and temperature that will cause gasoline vapors to ignite? A. None whatever.

Q. How do you distinguish between flash point and temperature?

A. Well, flash point is the temperature—you mean temperature of ignition?

Q. Yes.

A. The flash point is brought about by a flame which of itself is above the ignition temperature of the vapor, well above. Any flame, regardless how small, is above the ignition temperature of any petroleum vapor.

Mr. Platt: I think that is all.

Re-Cross-Examination

By Mr. Parry:

Q. What is the flash point of gasoline of the type used here?

A. Approximately 50 degrees Fahr. [534]

Mr. Parry: That is all, thank you.

Mr. Vargas: The defendant Odermatt has concluded his case in chief.

Mr. Platt: We have no further evidence, if the Court please.

The Court: Any rebuttal, gentlemen?

Rebuttal Testimony

EDWARD HERZINGER

having been previously sworn, testified as follows:

Direct Examination

By Mr. Daly:

Q. Mr. Herzinger, I don't know whether I asked you or not, who owned the underground tanks and the attachments at Mineral Hot Springs at the time of the fire?

A. The Standard Oil Company of California.

Q. Did you see the truck of Mr. Odermatt the day following the fire? A. Yes.

Q. Did you take some pictures of it?

A. Yes, I did.

Q. I will hand you Plaintiff's Exhibits No. 27 and No. 28 and ask you if those are the pictures you took of the truck? A. They are.

Q. When were they taken?

A. You mean about the time of the day? The day after the fire [535] they were taken.

Q. About what time of day, if you remember?

A. Approximately about noon.

Q. Now referring to Exhibit No. 28, I will ask you what you saw on observing the truck, with reference to the tire, the top of which is shown at the bottom of that picture?

A. The tire was scorched from the fire.

Q. And can you show the jury where that is indicated on the picture?

A. Along the side of the tire, outside of the tire.

(Testimony of Edward Herzinger.)

Q. And what about this metal rim that is around the bed of the truck?

A. It here was all scorched too, the edge of the truck.

Q. Handing you Plaintiff's Exhibit No. 27, Mr. Herzinger, I will ask you to describe to the jury the condition of the truck and point out to the jury what you are talking about on that picture.

A. Well, beginning at the front end of the truck, this fender here was scorched and part of the door around the cab was scorched, part of this box to where that hose reels up, filling oil they use that for, some of it is scorched; also you can see the railing of the truck that goes around is scorched. You can still see the same tire scorch on the side and also the side of these tanks. [536]

Q. Did you look underneath the truck?

A. Yes, I did.

Q. What did you find there?

A. The truck was scorched directly up these dual tires in the back.

Q. Did you examine the other tires on the truck?

A. Yes.

Q. Did you find any of them to be scorched?

A. No.

Mr. Daly: That's all.

Cross-Examination

By Mr. Vargas:

Q. Did you take these pictures, Plaintiff's Exhibits 27 and 28? A. Yes.

(Testimony of Edward Herzinger.)

Q. When did you take them?

A. Oh, as near as I can recollect, about noon the day following the fire.

Q. Where was the truck located at the time you took them?

A. Down at the Highway Department, in their yard.

Q. Were you at Mineral Hot Springs about eight or nine o'clock on the morning following the fire?

A. Yes, I was.

Q. Did you see Mr. Odermatt and Warner there at that time?

A. No, I don't recollect seeing him there. [537]

Q. Did you remain over on the night of May 3, 1947, at Mineral Hot Springs? A. Yes, I did.

Q. You stayed there the next morning?

A. Until about nine o'clock, as near as I can tell.

Q. Where did you go at nine o'clock?

A. Over to the depot where Mr. Black is.

Q. Were you around there until noon?

A. I was back and forth between Mineral Hot Springs and Contact.

Q. Did Mr. Moseley, your general manager, advise you on the morning of May 4, 1947, that Mr. Odermatt and Mr. Warner had come to Mineral Hot Springs for the purpose of seeing you?

Mr. Daly: Objected to as improper cross-examination.

The Court: Overruled.

(Question read.)

(Testimony of Edward Herzinger.)

A. As near as I remember, he had told me they had been down there, but whether the day after the fire or not, I couldn't say.

Q. Did he also tell you at that time that he, Mr. Moseley, your general manager, had advised Mr. Odermatt and Mr. Warner that you had gone to Idaho? A. No.

Q. Who was with you when you took those pictures?

A. Del Hardy, the constable at Contact. [538]

Q. Any one else? A. No.

Q. This truck was there at the Highway Maintenance Station? A. Yes, it was.

Q. Did you see Mr. Francis Harmer there?

A. No, not that I recall.

Q. Did you make any particular effort to locate Mr. Harmer at the time you took the pictures?

A. No, I did not.

Q. Did you see any one around the State Highway Maintenance Station on the occasion of your taking these pictures?

A. No, only the party that was with me.

Q. I mean at the time you took the pictures?

A. No, I did not.

Q. That was about noon on May 4th?

A. To my best recollection it was.

Q. How many people are stationed at the Highway Maintenance Station near Contact, Nevada, if you know?

A. My recollection two are all.

Q. Who are they?

(Testimony of Edward Herzinger.)

A. Francis Harmer and E. Cox.

Q. You were there taking pictures about noon on May 4, 1947? A. Yes.

Q. You did not see those people?

A. No, I don't recall seeing either one of them.

Q. Now will you point out to me, Mr. Herzinger, where that tire was burned that you say was burned, so the jury can see it? A. Along the side wall.

Q. Are you indicating or inferring that portion which was burned, according to your testimony, is the portion which appears scorched or discolored in the photograph, Plaintiff's Exhibit No. 28?

A. Yes.

Q. In other words, it is your testimony that the white portion of the tire displayed there is an indication of burned rubber, is that right?

A. I wouldn't say exactly burned, but scorched.

Q. Well scorched to a high degree, any rubber falling off? A. No.

Q. Would you say slightly scorched?

A. Well, I would say it was scorched to the extent it didn't melt the rubber, not hot enough to melt any rubber.

Q. Did that burned or scorched rubber appear white in color?

A. Part of it was white. It seemed rather blotched.

Q. Was that a white side wall tire?

A. I just couldn't say.

Q. Well, you looked at it, didn't you?

A. Yes.

(Testimony of Edward Herzinger.)

Q. Took a picture of it? [540] A. Yes.

Q. But you don't remember?

A. I can't say now.

Q. Looking at Plaintiff's Exhibit 27, which apparently portrays the rear portion of the same truck and the same rear right tire, would your recollection be refreshed as to whether or not it is a black rubber tire or a white side wall tire?

A. That would be hard to tell, being it is black from smoke and stuff like that scorch.

Q. You wouldn't then have any recollection, nor could your recollection be reliable, as to whether or not those were black rubber tires or white side wall tires on that truck, is that correct?

A. No, I couldn't say as to the white side wall.

Q. Was the outside wall of this right rear tire of the truck scorched to the extent that the side rubber was bubbled at all?

A. There appeared to be just like small blisters, that's all. Very few of them.

Q. Very few of those? A. Yes.

Q. Would it be your testimony that the right rear tire on this truck had actually been on fire?

A. Well, I would say it was in a place.

Q. Then I take it, it would be your testimony that the condition [541] of this tire, as you observed it, could not have originated simply by reason of some heat in the immediate vicinity without fire being on it, is that right?

A. I didn't get your question.

(Question read.)

(Testimony of Edward Herzinger.)

A. You mean without any fire being on the tire?

Q. Yes. Maybe I can clarify that a little. You testified this right rear tire was scorched. Would you say that condition of the tire, as you observed it on May 4, 1947, could not have arisen simply by reason of there being some heat in the immediate vicinity of the tire?

A. There had to be heat there to scorch the tire.

Q. Without flame, I mean, on the tire?

A. It is possible to be a flame too.

Q. In other words, you couldn't tell, from your examination of this tire, whether the scorch damage to it originated from its being on fire or originated simply from there being some heat in the immediate vicinity?

A. The reason I know there has to be a flame is directly above these duals the bottom of the truck was scorched from fire.

Q. But you couldn't determine as to whether this tire had been on fire simply by observation of the condition of the fire itself?

A. It had to be a fire. You can't get scorched without being [542] in fire.

Q. Well, do you testify, Mr. Herzinger, it is impossible for rubber to show any deterioration by application of heat in the immediate vicinity without the rubber being on fire?

A. There would be a deterioration but it couldn't be scorched.

Q. Now I believe you testified that the under portion, the bed of this truck, in the vicinity of the

(Testimony of Edward Herzinger.)

rear and between the dual wheels, showed evidence of burning? A. Above the dual wheels.

Q. Do you mean on the top or bottom of the rim?

A. Bottom of the bed, directly above.

Q. Was there a very appreciable burning, damage?

A. Well, not to any great extent. The wood was charred there.

Q. Did you by any chance take a picture from the rear of this truck?

A. I don't recall now if I did or not.

Q. Are these the only pictures of this truck you took, referring to Plaintiff's Exhibits 27 and 28?

A. Well, I couldn't say as to that, because all these pictures that were taken didn't always turn out and I had the best ones. Sometime we had light struck of the films.

Q. So you have no recollection now as to whether or not you may have taken a picture portraying the rear end of this truck?

A. I might have and I might not. I couldn't say to that.

Q. Do you have any recollection now as to whether or not you [543] may have taken a picture portraying the under side of the rear of the body of this truck?

A. I tried to, but it wouldn't show nothing accurate to show in the picture.

Q. Did you take any picture of the top of the tanks of this truck? A. No, I did not.

(Testimony of Edward Herzinger.)

Q. Had this truck been washed prior to the time you took these pictures, do you know?

A. I wouldn't know, but it didn't look like it

Q. Would you say, Mr. Herzinger, from your observation of the outside right rear tire on this truck on May 4, 1947, that the tire had been scorched or burned to such an extent that it was no longer usable?

A. No, it wasn't scorched that bad.

Q. In other words, the evidence of scorching on that tire, if any, was very mild, was it not?

A. Well, the tire was still inflated and it looked like it could have been used.

Cross-Examination

By Mr. Platt:

Q. Mr. Herzinger, you testified, with respect to the underground tanks, installation of the underground tanks. Do you know who actually installed the tanks?

A. Well, I wouldn't know who the man was who installed the [544] tanks. All I know I had to pay a monthly rental on the tanks and all the connections and equipment.

Q. You testified when you were on the stand the first day of the trial that there were lease arrangements between you and Standard Oil Company of California. You testified that a lease had been executed by the Standard Oil Company to O. J. McVey and Nellie R. McVey, his wife, then that lease was assigned to the Browns and was later assigned to you, isn't that true?

A. Yes.

(Testimony of Edward Herzinger.)

Q. In other words, you were operating under the original lease of June 3, 1941, to O. J. McVey and Nellie R. McVey, his wife, which had been assigned to the Browns and later assigned to you?

A. I wouldn't know as to the date of the lease, when it was made, but it is the same lease.

Q. Aside from the date of the lease, that was the arrangement, wasn't it? I have the documents here and he has already testified to this arrangement. I want to call your attention to this lease, that is, this lease of June 3, 1941, which was assigned to the Browns and later assigned to you, and I want to call your attention——

The Court: Is that an exhibit in the case?

Mr. Platt: No, your Honor, it was admitted by stipulation. [545]

The Court: I think it should be admitted in evidence before the witness is asked any questions.

Mr. Platt: Well, we offer the original lease.

Mr. Parry: No objection.

The Court: It may be admitted as Defendant Standard Oil Exhibit B.

Mr. Platt: We have the assignments also, your Honor. We can offer them in evidence.

Mr. Parry: We have no objection to the three assignments which have been submitted to us.

The Court: The three assignments may be marked as one exhibit as Standard Oil's Exhibit C and admitted in evidence.

Mr. Platt: May we have the privilege of substituting copies?

(Testimony of Edward Herzinger.)

The Court: It may be understood that counsel may substitute photostatic copies.

Q. Now calling your attention, Mr. Herzinger, to this lease of June 3, 1941, between O. J. McVey and Nellie R. McVey, his wife, and Standard Oil Company of California, I want to read to you paragraph 4 of this lease. Under this arrangement Standard Oil was leasing from O. J. McVey and Nellie R. McVey, and later, as the testimony shows, this lease was assigned until the final assignment reached you and you, as the lessor under paragraph 4 of this lease agreed as follows: [546]

“Lessor agrees, during the term of this lease, or any extension thereof, to maintain in good condition and repair all service station equipment, facilities, yards, driveways, and other improvements installed or made by Lessor on the demised premises, except such service equipment, facilities, yards, driveways, and other improvements owned by Lessee.”

Now, during all of the time that you have occupied the premises, you have operated under this lease and the attendant assignments, is that true?

Mr. Parry: You mean up to the time of the fire?

Mr. Platt: Yes, up to the time of the fire.

A. Yes.

Mr. Platt: That is all.

Redirect Examination

By Mr. Daly:

Q. Where is Del Hardy now, if you know?

(Testimony of Edward Herzinger.)

A. He is deceased now.

Q. What? A. He died.

Mr. Parry: Plaintiff rests, your Honor.

The Court: Any further testimony?

Mr. Platt: No, your Honor.

Mr. Halley: None. [547]

State of Nevada,
County of Ormsby—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, in and for the District of Nevada, do hereby certify: That I was present and took verbatim shorthand notes of the testimony adduced and proceedings had in the foregoing-entitled matter, Edward Herzinger, Plaintiff, vs. Standard Oil Company of California, a Corporation, and E. J. Odermatt, Defendants, No. 680, at the trial held in Carson City, Nevada, commencing on the 8th of February, 1950, to and including the 16th of February, 1950, and that the foregoing pages, numbered 1 to 547 inclusive, comprise a full, true, and correct transcript of my said shorthand notes, to the best of my knowledge and ability.

Dated at Carson City, Nevada, August 1, 1950.

/s/ MARIE D. McINTYRE,
Official Reporter.

[Endorsed]: Filed August 2, 1950.

[Title of District Court and Cause.]

PROCEEDINGS IN CHAMBERS

Present:

R. P. PARRY, ESQ.,

JOHN H. DALY, ESQ.,

ORVILLE R. WILSON, ESQ.,

Attorneys for Plaintiff.

SAMUEL PLATT, ESQ.,

Attorney for Defendant,

Standard Oil Company of California.

GEORGE VARGAS, ESQ.,

JOHN S. HALLEY, ESQ.,

Attorneys for Defendant Odermatt.

* * *

The Court: An exception will be granted to the refusal to give Standard Oil Company of California Instruction No. 1, and also to giving defendant Odermatt's requested Instruction No. 1. Any further requests?

Mr. Daly: The plaintiff had one. It was instruction which was in our proposed instructions and numbered 5, begins: "If you find that the defendant E. J. Odermatt was not an agent of defendant Standard Oil Company of California, which Standard Oil Company has represented to the plaintiff that E. J. Odermatt was its agent and thereby caused plaintiff justifiably to rely * * *"

Mr. Platt: May the record note exception of the Standard Oil Company of California to the rulings of the Court upon the instructions submitted by the defendant Odermatt? We joined in the objections but I find we did not in the exception.

The Court: The record may so show. The plaintiff submitted instruction, the opening clause of which is: "If you find that the defendant E. J. Odermatt was not an agent of defendant Standard Oil Company of California," and the Court has refused to give such instruction. The instruction will be designated in the record as Instruction Proposed by the Plaintiff and Refused, numbered 1.

Mr. Daly: The record will show the plaintiff's exception.

* * *

The Court: Now I take the situation to be that this explanation now given to the jury is given without objection on the part of counsel, but that in not making any objection to the explanation, counsel has not waived any objection heretofore made or exception taken to Instruction No. 22 or any other instruction given by the Court.

Mr. Halley: Thank you, your Honor.

Mr. Daly: I think, if the Court please, that the plaintiff will object to the giving of that portion of the explanation requested by the jury of instruction which states that the plaintiff's burden of proving negligence and the proximate cause of the fire is not changed by the rule just mentioned.

The Court: The objection may be noted and plaintiff may have the benefit of that objection and exception that may be necessary.

State of Nevada,
County of Ormsby—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, in and for the District of Nevada, do hereby certify: That the foregoing pages, numbered 1 to 17 inclusive, constitute a full, true, and correct transcript of my shorthand notes in case No. 680, entitled, Edward Herzinger, Plaintiff, vs. Standard Oil Company of California, a Corporation, and E. J. Odermatt, taken at the conclusion of the evidence in the trial of said case, in chambers and in open court in the presence of the jury and in the absence of the jury, in Carson City, Nevada, on February 16, 17, and 18, 1950.

Dated at Carson City, Nevada, November 1, 1950.

/s/ MARIE D. McINTYRE,
Official Reporter.

[Endorsed]: Filed U.S.D.C. November 10, 1950.

[Endorsed]: Filed U.S.C.A. November 13, 1950.

[Endorsed]: No. 12,668. United States Court of Appeals for the Ninth Circuit. Edward Herzinger, Appellant, vs. Standard Oil Company of California, a Corporation, and E. J. Odermatt, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Nevada.

Filed August 29, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

No. 680

EDWARD HERZINGER,

Appellant,

vs.

STANDARD OIL COMPANY OF CALIFORNIA,
a Corporation, and E. J. ODERMATT,

Appellees.

STATEMENT OF POINTS AND DESIGNA-
TION OF PORTIONS OF RECORD TO BE
PRINTED

The points on which Appellant intends to rely in this Court in this case are as follows:

1. The Court erred in failing to instruct the jury that: "If you find the defendant E. J. Odermatt is not an agent of the defendant Standard Oil Company of California, but the defendant Standard Oil Company of California has represented to the plaintiff that E. J. Odermatt was its agent and thereby caused plaintiff justifiably to rely upon the care or skill of such apparent agent or his assistants, then the defendant, Standard Oil Company of California is subject to liability to the plaintiff for harm caused by the lack of care or skill of the defendant E. J. Odermatt or his assistants the same as if the defendant E. J. Odermatt were the agent of the defendant Standard Oil Company of California," as

requested by plaintiff in writing, being designated as Plaintiff's Instruction No. 1, and plaintiff having objected to the failure of the Court to so instruct the jury.

2. The Court erred in explaining instructions No. 21 and No. 22 by instructing the jury over plaintiff's objection that: "Plaintiff's burden of proving negligence and the proximate cause of the fire by a preponderance of the evidence is not changed by the rule just mentioned," such instruction being, under the circumstances, misleading and prejudicial to plaintiff.

3. The evidence was insufficient to justify the verdict of the jury in that there was no substantial evidence to show that the defendant, Odermatt or his assistant, in the delivery of gasoline to the plaintiff on May 3, 1947, exercised due care, and in fact, the evidence disclosed as a matter of law that the defendant Odermatt's assistant was negligent in such delivery.

4. The Court erred in overruling plaintiff's objection to the testimony of the witness Jacob A. Ryan, under which rulings of the Court the witness was permitted to invade the province of the jury and to answer hypothetical questions which did not contain all of the elements of fact established by the evidence in this case.

5. That the Court erred in denying plaintiff's Motion for New Trial.

The following portions of the record as filed in this Court are material to the consideration of this Appeal and should be printed by the Clerk for the hearing of the case:

- (1) Amended Complaint.
- (2) Answer of Defendant, Standard Oil Company of California, a Corporation, to the Amended Complaint.
- (3) Answer of defendant, E. J. Odermatt, to the Amended Complaint.
- (4) Order on Pre-trial Conference.
- (5) Request for Instructions by Jury.
- (7) Explanation Requested by Jury of Instructions.
- (8) Verdict of the Jury and Judgment Entered Therein.
- (9) Motion for New Trial.
- (10) Order Denying Motion for New Trial.
- (11) Reporter's Transcript of Testimony.
- (12) The following Exhibits introduced at the trial: Plaintiff's Exhibits: 1, 2, 3, 4, 6, 8, 9, 10, 18, 19, 20, 21, 22, 23, 24, 25, 27, and 28. Defendant's Exhibits: O-A, O-B, O-C, O-D, St. Oil B and St. Oil C.

(13) Notice of Appeal.

/s/ ORVILLE R. WILSON,

/s/ R. P. PARRY,

/s/ J. R. KEENAN,

/s/ T. M. ROBERTSON,

/s/ JOHN H. DALY,

Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 29, 1950.